M&A LITIGATION 2022

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LEXOLOGY
Getting the Deal Through

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Lexology Getting the Deal Through is delighted to publish the fifth edition of *M&A Litigation*, which is available in print and online at www.lexology.com/gtdt.

Lexology 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 Lexology Getting the Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

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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.

Lexology 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 the contributing editors, Matthew Solum and Stefan Atkinson of Kirkland & Ellis LLP, for their continued assistance with this volume.

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Introduction

Matthew Solum, Stefan Atkinson and Yi Yuan
Kirkland & Ellis LLP

M&A transactions are often transformational events for the companies involved and implicate a number of substantive and institutional considerations. The main substantive considerations in M&A litigation involve the rights and duties of parties affected by the transaction, which may include the directors, officers, employees and shareholders of the constituent corporation. The main institutional considerations concern the role of courts in adjudicating (and even sometimes intervening with respect to) M&A transactions, which are discretionary business decisions.

The following chapters present an overview of M&A litigation across jurisdictions around the world. We trust that these chapters will serve as useful guidelines on how different jurisdictions approach the substantive and institutional considerations inherent in M&A litigation. We emphasise, however, that the following responses are provided as general guidance only, and should not be construed as opinions or views on any specific set of facts or transaction.

At a high level, several similarities are present across jurisdictions in both common law and civil law systems. Most jurisdictions have similar views on the primacy of the shareholder franchise and the role of the directors and officers of the corporation. For example, jurisdictions typically will not interfere with an outcome that has been approved by a fully informed vote of the unaffiliated shareholders, as is frequently required before an M&A transaction can close. Further, almost all jurisdictions impose duties upon the directors and officers of the corporation broadly similar to the duty of care and duty of loyalty. Thus, directors and officers of corporations, no matter where they are located, should generally act on an informed basis, free from conflict, and in the best interests of the corporation.

Most jurisdictions also have similar views on the role of courts and other institutions in intervening with respect to or otherwise regulating M&A transactions. Typically, courts around the world are reluctant to second-guess the discretionary decisions of directors and officers in connection with an M&A transaction, where that decision has been made on an informed basis, free from conflict, and in the best interests of the corporation. In some jurisdictions, that reluctance takes the form of a default presumption such as the business judgment rule; in other jurisdictions, it is less explicit but exists as a matter of practice. Jurisdictions also generally recognise that in certain cases, the interests of the corporation's directors and officers may not be aligned with the interests of the corporation and, in those cases, allow greater scrutiny of the discretionary decisions of the directors and officers. This scrutiny may come in the form of heightened judicial review, or through additional legal or regulatory requirements that these M&A transactions must meet.

Differences also present across jurisdictions, particularly with respect to the methods and procedures for conducting M&A litigation. In part, that is because the United States is somewhat atypical in how it approaches these issues. For example, the United States generally permits shareholders to assert claims on behalf of other similarly situated shareholders through a class action, as long as the representative shareholder and claims meet certain requirements. As a result, in practice, shareholder claims in public M&A litigation are frequently brought as a class action. Many jurisdictions, however, either do not permit class actions for shareholder claims in connection with an M&A transaction, or do not see frequent use of the class action mechanism for M&A litigation.

In addition, the United States has a comparatively permissive policy towards pre-trial discovery, which is balanced by the ability of defendants to dismiss the suit through pre-discovery motions. Many other jurisdictions, particularly in civil law countries, do not allow such comprehensive pre-trial discovery. Those jurisdictions frequently do not permit early dismissal of a lawsuit on substantive grounds either. Moreover, there are differences between jurisdictions with respect to whether the corporation can control the forum for M&A litigation through corporate charters or by law. Some jurisdictions like the United States generally allow the corporation to select the forum for certain types of M&A litigation; other jurisdictions do not, and will instead use generally applicable jurisdiction and venue rules to determine the appropriate forum for M&A litigation. Thus, the conduct of M&A litigation can vary significantly between jurisdictions, even if the substantive duties of directors and officers may be broadly similar.

These similarities and differences across jurisdictions have generally persisted through this 2022 update of this publication. However, a significant development in M&A litigation over the past year has been the rise in M&A litigation connected to the impact of the covid-19 pandemic. Going into the third year of the pandemic, we have seen businesses in multiple industries experience severe declines in revenue initially followed by a stop-and-start recovery that has, in some circumstances, forced businesses to operate differently. As a result, many buyers have questioned whether they must close pending deals to buy affected businesses that were negotiated and agreed upon prior to the onset of the pandemic. To that end, some buyers have turned to M&A litigation, claiming that the effects of the pandemic constituted either a material adverse effect on the seller's business or that the seller's changes to its business in response to the pandemic breached covenants requiring the seller to operate in the ordinary course of business. Similarly, we have seen shareholders bring M&A-related claims that touch on the pandemic, including claims alleging insufficient disclosure around the risks companies face. Courts have begun to decide all of these kinds of pandemic-related M&A litigation, with varying outcomes depending, sometimes, on the types of claims asserted.

Another covid-19 development that will continue to persist for some time is the effect of covid-19 relief programmes on future M&A transactions. As we are all well aware, many jurisdictions instituted comprehensive relief programmes for certain businesses that were affected by the pandemic. Some of these relief programmes, which often involved financing to keep businesses afloat during the early stages of the pandemic, came attached with several types of restrictions. For example, in the United States, small to medium-sized businesses that took advantage of federal pandemic loans will be restricted in their ability to raise executive compensation or repurchase stock until a year after they have paid back their loans. These kinds of restrictions will have an ongoing effect on future M&A transactions and potentially M&A litigation.

Belgium

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TYPES OF SHAREHOLDERS' CLAIMS

Main claims

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 Belgium as it is in other jurisdictions, such as the United States.

The main types of claims that can be asserted by shareholders are regulated by the Belgian Code of Companies and Associations (BCCA). These are listed below.

- Liability for negligence in management: directors may have personal liability with regard to the company for management faults. If a director fails to exercise reasonable care in managing the company, the general meeting of shareholders may decide to sue the director or the board of directors for damages to the company.
- Liability for violation of the BCCA or articles of association: directors are liable in respect of the company, as well as in respect of third parties, such as individual shareholders, for breaches of the BCCA or the articles of association. The articles of association of a company regularly provide certain requirements in relation to M&A transactions, such as the approval of the investment committee or the shareholders. Failure to comply with those requirements may trigger claims from shareholders against the directors.
- Directors may be held liable for tort or non-contractual breaches pursuant to article 1382 of the Civil Code: any person who causes damage to another person can be held liable to indemnify the other person for the damage it has suffered.
- Fault in the preparation or completion of the merger or demerger: each shareholder of a company that is dissolved owing to a merger or demerger may bring a claim against the directors to compensate for any damage that it would suffer as a result of a fault in the preparation or completion of the merger or demerger. Examples of faults are the absence of required board reports, providing wrong information to the shareholders or completing a merger or demerger on the basis of a manifestly incorrect valuation. A shareholder may also bring a claim against the statutory auditor or external accountant who prepared the required audit reports.
- Mismanagement: under certain conditions, minority shareholders can bring a claim against the directors for mismanagement (eg, owing to faults in relation to M&A transactions). In a private limited company (BV) (which, together with a public limited company (NV), constitutes the most common type of Belgian company), a claim can be brought by shareholders holding at least 10 per cent of the issued shares. In an NV, this right is available to shareholders holding at least 1 per cent of the voting rights in the company or securities representing at least €1.25 million of the capital. If a shareholder has voted in favour of the discharge of the directors for the financial year concerned, the shareholder is no longer entitled to bring a minority claim for the actions of the director (unless the discharge has been granted on the basis of incorrect information). Minority shareholder actions are brought on behalf of the company. Any compensation awarded will, therefore, be paid to the company; however, if the claim is awarded, the company must reimburse the costs of the minority shareholders for bringing the claim.
- Material endangerment of company interests: shareholders of an NV holding jointly or individually 1 per cent of the total number of voting securities or securities representing a nominal value of at least €1.25 million (in the BV, the threshold is set at 10 per cent of the issued shares) can request the court to appoint an individual expert to verify the books and accounts of the company and the transactions made. Shareholders can launch the request by way of summary proceedings and must evidence that there are genuine presumptions that the interests of the company are materially (threatened to be) endangered.

Requirements for successful claims

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

To assert a claim further to tort or a non-contractual breach pursuant to article 1382 of the Civil Code, the claimant must evidence the fault, the amount of the damage and the causal link between the fault and the damage.

Claims launched in relation to mergers or demergers are usually motivated by a lack of information on the contemplated transaction, non-compliance with the procedural rules governing mergers or a challenge of the calculation of the exchange parity.

Mismanagement of the company by directors is assessed by the courts by reference to the standard of a reasonable person acting prudently and diligently. Directors can only be held liable in this respect for decisions, acts or behaviour that are clearly outside the margin within which a normally careful and prudent director would have acted in similar circumstances.

Claims to appoint an individual expert must be supported by genuine presumptions that the interests of the company are materially (threatened to be) endangered.

Minority shareholders are also protected against abuses by majority shareholders of the latter's rights. To be successful, they must prove that the decision that was made goes against the company's interests and was made solely in the interest of the majority shareholders.

Publicly traded or privately held corporations

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; hence, compared to privately held companies, they must comply with certain additional rules, in particular in relation to transparency and information obligations regarding the public.

For instance, the insider trading rules require publicly traded companies to disclose in a timely manner the intention to enter a transaction to the public. When a publicly traded company is the object of either a voluntary or hostile bid of a public character or a mandatory takeover bid, specific regulations on public takeovers will apply.

Form of transaction

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

Claims for tort or non-contractual breaches pursuant to article 1382 of the Civil Code, mismanagement and breaches of the BCCA or the articles of association are possible irrespective of the form of the transaction.

However, additional rules and potential claims apply for corporate reorganisations that are regulated by the BCCA, such as a merger, demerger, transfer of a business or transfer of a universality. If a transaction requires a decision of the general shareholders' meeting (eg, to amend the articles of association), the decision can, as a general principle, be challenged in a manner similar to any other resolution of the general shareholders' meeting (eg, non-compliance with statutory or legal convening formalities or majority or in the case of abuse of a minority position).

Negotiated or hostile transaction

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 principle, directors must always act in the company's best interest, regardless of whether they are facing a negotiated transaction or a hostile offer.

However, the situation 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. The boards of publicly traded companies that have received 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 articles of association. Shareholders may have a claim against the directors if they violate the powers granted to them by the articles of association.

Party suffering loss

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 for individual damages if they can evidence that the damage is personal and different from the damage suffered by the company. This implies that a shareholder cannot claim individual damages to compensate for the depreciation of its shares if it is linked to a decrease in the company's valuation.

In practice, this makes it very difficult for shareholders to bring claims for individual damages. Only the company, by way of a claim introduced by the general shareholders' meeting, can bring a claim for damages sustained by the company. Under certain conditions, minority shareholders can bring claims on behalf of the company if the general shareholders' meeting fails to bring the claim.

COLLECTIVE AND DERIVATION LITIGATION

Class or collective actions

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 are only permitted for a limited set of claims (eg, commercial practices and consumer protection, product liability and data protection) and are not available to shareholders.

However, joint actions are allowed in Belgium and are used as a substitute for class actions. A court will allow such action provided that the claims are sufficiently linked and provided further that there is no risk that courts would render contradicting decisions if the cases were to be tried separately. If allowed, the actions will be addressed jointly by the court, even if they remain, from a legal perspective, individual actions.

In joint actions, each plaintiff must evidence an immediate, personal and actual interest in the claim and must have consented to the commencement of proceedings in his or her name.

Derivative litigation

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?

Members of the corporate bodies of a company, the persons in charge of daily management, and all other persons who hold or have held power to manage the corporation (the 'de facto directors') can be held liable in respect of the company for faults committed in the performance of their duties.

Minority shareholders may bring a claim on behalf of the company, provided that they hold at least 10 per cent of the issued shares (in a private limited company) or at least 1 per cent of the votes (in a public limited company).

In both cases, shareholders with voting rights can only bring a claim if they have not approved the board members' discharge or if they have not validly approved it. Since the claim is brought on behalf of the corporation, the potential compensation will be paid to the company and not directly to the shareholders.

INTERIM RELIEF AND EARLY DISMISSAL

Injunctive or other interim relief

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 respect of M&A litigation, interim or conservatory measures can be claimed in Belgium either in separate summary proceedings or in accordance with article 19(3) of the Judicial Code as part of the proceedings on merit.

The president of the court will grant interim relief, provided the claimant demonstrates that:

- it concerns an urgent matter;
- the claimant has a prima facie claim;
- the balance of interest must be in favour of granting the requested relief (ie, the result of the relief, if granted, may not be disproportionate); and

- the requested measure is temporary in nature (ie, it may not affect the decision that will be taken later on the merits of the case).

In the event of absolute necessity, interim or conservatory measures can be obtained in ex parte proceedings (ie, cases where the other party is not present or represented).

As part of the proceedings on merit, the parties can rely on article 19(3) of the Judicial Code to request a court, at any stage of the proceedings, to order an interim measure intended to investigate the claim, settle an interim dispute or settle temporarily the situation of the parties. Contrary to summary proceedings, the claimant is not required to demonstrate urgency to obtain interim measures.

Early dismissal of shareholder complaint

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

The defendant cannot seek early dismissal of a shareholder complaint, except in cases where it can establish that the court is not competent to deal with the case or if a writ of summons has not been served in accordance with the applicable provisions (this is less common). The concepts of discovery and disclosure do not exist under Belgian law.

ADVISERS AND COUNTERPARTIES

Claims against third-party advisers

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

In principle, only the company can bring a contractual claim on the basis of its contractual relationship with the third-party adviser. Shareholders, therefore, cannot do so but can bring a claim on the basis of the general tort provisions in the Civil Code.

Claims against counterparties

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

In principle, only a party to a contract can bring a contractual claim against a counterparty. Shareholders cannot do so, assuming they are not a party to the contract; however, they can bring a claim on the basis of the general tort provisions in the Civil Code.

LIMITATIONS ON CLAIMS

Limitations of liability in corporation's constitution documents

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 general shareholders' meeting from liability in respect of the company as part of the process regarding the approval of the company's annual accounts. The discharge is based on the information presented in the annual accounts.

If the annual accounts present incorrect information, discharge granted on this basis will be invalid, unless the shareholders were aware of the actual situation of the company based on other sources of information.

The Belgian Code of Companies and Associations (BCCA) explicitly provides that the company cannot exempt its directors from, nor hold them harmless against, any future directors' liability. Any provision in the articles of association or in any agreement in this respect will be deemed null and void. It is, however, possible that third parties (eg, the parent company or shareholders of the company) may enter into contractual arrangements to hold the directors harmless.

Statutory or regulatory limitations on claims

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?

The BCCA provides a quantitative cap on the financial liability of directors. The cap varies depending on the size of the company (determined on the basis of turnover and balance sheet): it ranges from €125,000 for the smallest companies to €12 million for the largest companies. For listed companies, the cap is always €12 million.

The limit does not apply in the case of gross negligence, minor but regular errors, fraudulent intent or intent to cause harm. A number of specific tax and social security liabilities are also excluded. The amount of the cap depends on the alleged offence (or the offences considered as a whole), regardless of the number of claimants, the number of directors involved or the nature of the claim.

Under Belgian law, shareholders are only able to claim individual damages from the directors, provided they can evidence that the damage is personal and different from the damage suffered by the company.

Common law limitations on claims

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

When a court is requested to rule on a shareholder claim brought against board members or executives, it will assess the underlying facts by reference to the standard of a reasonable person acting prudently and diligently. As a result, board members and executives can only be held liable in this respect for decisions, acts or behaviour that are clearly outside the margin within which a normally careful and prudent director would have acted in similar circumstances.

A court will also take into account what would have been considered reasonable at the time that the decision was made, rather than assessing the situation with the benefit of hindsight.

STANDARD OF LIABILITY

General standard

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 M&A transactions. The general principles of law and those set out in the Belgian Code of Companies and Associations (BCCA) will, therefore, apply.

Board members or executives can only be held liable if they have committed a fault. The BCCA provides, in general terms, that the liability of a board member or executive can be triggered further to an infringement of the BCCA or the company's articles of association or in the case of mismanagement.

Mismanagement of the company by board members and executives is assessed by the courts by reference to the standard of a reasonable person acting prudently and diligently. They can only be held liable in this respect for decisions, acts or behaviour that are clearly outside the margin within which a normally careful and prudent director would have acted in similar circumstances.

Type of transaction

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.

Type of consideration

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.

Potential conflicts of interest

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 will not vary.

On the other hand, potential conflicts of interest trigger a specific regime for board members.

As a general principle, directors must always act in the interest of the company, which implies that they must refrain from serving their own personal interests when acting and taking decisions as a director.

If a director has a direct or indirect interest of a financial nature that conflicts with the interest of the company in relation to a proposed decision, he or she must notify the other directors and the statutory auditor (if any) thereof before the decision is taken by the board. The director's statement and explanation of the nature of this conflict must be documented in the board minutes. The conflicted director may not participate in the deliberations nor vote on the decision.

If all directors are conflicted, the decision must be escalated to the shareholders' meeting. This conflict of interest procedure does not apply in the following cases:

- intra-group conflicts: transactions between closely related companies (ie, where one of the two companies involved holds at least 95 per cent of the securities issued by the other company or at least 95 per cent of both companies are owned by the same parent company); or
- ordinary regular transactions concluded at usual market conditions.

In addition, in certain cases, the intra-group conflict procedure may apply within listed companies.

Controlling shareholders

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 rateably with all shareholders?

No, the standard does not vary where the controlling shareholder is a party to the transaction.

However, the BCCA provides that listed companies must, in principle, apply the intra-group conflict procedure as this concerns a transaction of the listed company (or one of its unlisted subsidiaries) with a related party within the meaning of International Accounting Standard 24. This procedure does not only apply to transactions between the listed company and its controlling shareholders but also to transactions with board members.

The key aspects of the procedure are as follows:

- each transaction with a related party must be approved by the board. If the related party is a member of the board, that board member cannot participate in the deliberations nor vote on the decision;
- a committee of three independent directors must give the board non-binding advice on the terms of the envisaged transaction; and
- the transaction must be disclosed to the public no later than the time of conclusion of the transaction.

The disclosure must provide details on the identity of the related party, the value of the transaction and such other information as required to assess whether the transaction is reasonable and fair. The advice of the committee of independent directors must also be published, together with (as the case may be) the reasons why the board decided to deviate from it.

The above procedure does not apply in relation to:

1 non-material transactions with a value of less than 1 per cent of the company's net assets on a consolidated basis; and
2 customary transactions at market conditions, except remuneration decisions, transactions in own shares, interim dividend payments and capital increases with preferential subscription rights.

Regarding the calculation of the 1 per cent threshold in point (1), non-material transactions with the same related party must be aggregated over a period of 12 months.

INDEMNITIES

Legal restrictions on indemnities

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 Belgian Code of Companies and Associations provides that a company (or its subsidiaries) cannot hold its directors harmless against any costs in relation to directors' liability. Any statutory or contractual arrangement in this respect is considered null and void.

However, third parties (eg, the parent company or shareholders of the company) may still enter into contractual arrangements to hold the directors harmless. In addition, a company can take out and pay directors' liability insurance for the benefit of its directors and executive management. The insurance usually covers legal and judicial defence costs.

M&A CLAUSES AND TERMS

Challenges to particular terms

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

Shareholders have no personal right to challenge the clauses or terms of M&A transaction documents unless they are a party to these.

PRE-LITIGATION TOOLS AND PROCEDURE IN M&A LITIGATION

Shareholder vote

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

A shareholder vote would, in principle, not impact an acquisition or sale: usually, an ordinary share transfer must be approved by the board of directors only and not by the general shareholders' meeting, unless the articles of association or specific regulation would provide otherwise.

Mergers, demergers or transfers of a universality or business unit require, in principle, the approval of the general shareholders' meeting.

The vote of shareholders in an M&A transaction, or the approval thereof, generally strengthens the board's position in M&A litigation, and

it will be difficult for the shareholders, in such case, to hold the board members liable for the potentially adverse effects of the transaction.

However, 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 breached or if the majority shareholders have abused their position.

If a shareholder has voted in favour of the discharge of the directors for the financial year concerned, the shareholder is no longer able to bring a minority claim for actions by those directors (unless the discharge has been granted on the basis of incorrect information and, hence, is invalid).

Insurance

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' insurance in general. In respect of M&A litigation, it will be relevant in cases against directors and officers. Given that there are different degrees of coverage, the policies must be reviewed on a case-by-case basis.

Burden of proof

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?

Each party must provide evidence regarding the facts that it invokes. To that effect, the parties can resort to all methods of evidence permitted by law. The same principle applies to M&A litigation.

As an exception to the above general principle, as of 1 November 2020, courts can decide to reverse the burden of proof, provided that:

- exceptional circumstances justify this;
- the application of the aforementioned principle is manifestly unreasonable;
- the judge renders a separate judgment on such request, setting out its specific motivation for the decision;
- all relevant investigative measures have been ordered beforehand;
- the court has ensured that the parties cooperate in the provision of evidence; and
- insufficient evidence has been provided.

Pre-litigation tools

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

Belgian corporate law provides various tools that allow the shareholders to obtain information that can be used to investigate potential claims. There are no pre-ligation tools specifically available for M&A litigation only.

The main tools available to shareholders are summarised below.

- Before or during the (annual) general shareholders' meeting, shareholders can question the board members or executives in relation to the items on the agenda of the general shareholders' meeting. The board must respond to the questions, unless it deems disclosure of the information to be materially adverse to the interests of the company or would violate confidentiality undertakings of the company. Shareholders are, in principle, not entitled to ask questions outside the general shareholders' meeting.
- The board of directors and (as the case may be) the statutory auditor must convene a shareholders' meeting within three weeks if requested by shareholders holding at least 10 per cent of the issued shares in a private limited company (BV) (or, in the case of the public limited company (NV), at least 10 per cent of the capital).
- Shareholders of listed companies holding at least 3 per cent of the company's capital can request to add additional items to the agenda of the general shareholders' meeting and propose resolutions for points already on the agenda.
- Shareholders have the right to obtain copies of board reports, statutory auditor reports and certain other documents (eg, the annual accounts) in advance of the relevant general shareholders' meeting.
- If no statutory auditor has been appointed, each individual shareholder has the same powers of investigation and control that are attributed by the Belgian Code of Companies and Associations (BCCA) to the statutory auditor if the auditor had been appointed. This is limited to investigating the financial situation, annual accounts and compliance with corporate and accountancy regulations. A full investigation on the management of the company is excluded.
- Shareholders of an NV holding (jointly or individually) 1 per cent of the total amount of voting securities or securities representing a nominal value of at least €1.25 million (in a BV, the threshold is set at 10 per cent of the issued shares) can request the court to appoint an expert to verify the books and accounts of the company and the transactions made by the corporate bodies.

Forum

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

The enterprise courts are usually competent given the commercial nature of M&A-related cases. Summary proceedings are decided by the president of the tribunal of first instance or by the president of the enterprise court.

In respect of contractual claims, the territorially competent court is that elected in a jurisdiction clause or, in the absence of such clause, the plaintiff has the choice between the court where the defendant has its registered office or domicile or the court of the place where the contract was or must be executed.

The articles of incorporation may include a jurisdiction clause.

Expedited proceedings and discovery

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

There are various types of expedited proceedings that are available under Belgian law.

In the framework of summary proceedings, a preliminary court decision can be requested from the president of the tribunal of first instance or from the president of the enterprise court. The basic requirement in summary proceedings is urgency (ie, the plaintiff must prove that immediate action is required to prevent serious damage or substantial inconvenience). Although summary proceedings compensate for the slow process of ordinary proceedings, the courts will not decide on the merits of the case; they will only render a preliminary court decision.

Summary proceedings are, in principle, inter partes proceedings where all parties will be heard. In cases of absolute urgency, it is possible to initiate the case with an ex parte request where only the requesting party will be heard. Absolute necessity is usually accepted in the following cases:

- extreme urgency (eg, even a minimal delay would lead to irreparable damage);
- the need to take the adverse party by surprise (eg, to carry out a bailiff's report on a company); or
- the impossibility of identifying the other parties.

Nevertheless, a number of procedures are conducted 'as if in summary proceedings', whereby the proceedings are fast-tracked, but the case is heard on its merits. Although the most common as if in summary proceedings concern cease-and-desist orders in unfair market practices or alleged infringements of intellectual property rights, the BCCA provides that the proceedings can be brought before the president of the enterprise court in respect of claims for the exclusion of shareholders or the forced buyout of shares.

In the course of 'as if in summary proceedings', where the company must be summoned as a party, the court will be able to decide on related claims, provided that the dispute relates to financial relations or non-compete clauses. The same court can settle disputes concerning title to the shares insofar as this is necessary to assess the admissibility of the action. Finally, parties can ask for provisional measures in relation to the company.

In straightforward cases that only require limited pleading, the case can be pleaded at the introductory hearing or on a date close to the introductory hearing (at the request of the plaintiff, who specifies this request in the writ of summons), after which the court will render its decision.

The Judicial Code does not provide for discovery or pre-trial disclosure proceedings. If there are serious, specific and concurring presumptions that a party (or a third party) holds a document or data that contains proof of a relevant fact, the judge can order that party or third party to submit the document or data.

DAMAGES AND SETTLEMENTS

Damages

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

Damages for a contractual breach correspond to the compensation required to put the party suffering the breach in the same position as if the breach had not occurred and the contract had been duly performed. Likewise, under tort law, the damaged party must be placed in the situation that would have existed had the infringement not occurred.

It is generally accepted that the Belgian concept of damages includes direct and indirect damage. There is, however, no statutory definition of indirect damage, and case law does not provide for a clear definition either. As a result, the exact scope of direct and indirect damage remains unclear, and parties to a contract are recommended to agree on a definition of what constitutes direct and indirect damages.

Compensation for contractual breaches can only be claimed for damage of which the existence (not the amount) was foreseeable or foreseen at the time of conclusion of the contract, unless it was caused by a fraudulent act or wilful misconduct, in which case unforeseeable damage must be compensated for.

Under Belgian tort law, the general principle is that the defaulting party must ensure full compensation for the damage suffered by the other party, including foreseeable and unforeseeable damage.

Courts rule on the existence and the amount of damages claimed based on the following main principles:

- damages must be awarded on the basis of the specific circumstances of the case;
- damages must be determined on the date of the judgment so that any increase of the damages since the date on which the extra-contractual breach occurred until the final judgment will be taken into account, provided that the increase is not the result of external causes;
- damages must be determined as precisely as possible, taking into account the circumstances of the (extra-) contractual breach; however, if the court rules that the calculation method proposed by the non-breaching party is inappropriate and that there is no other way for determining the precise amount of the damages, the court will award 'fair' compensation;
- courts should only look at the damage and cannot take into account the seriousness of the contractual breach.

As courts can award damages at their own discretion, this may, in theory, trigger differences between the various Belgian courts. However, in practice, the differences are rather limited, and courts usually award similar damages for similar breaches.

Settlements

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

There are no special issues.

THIRD PARTIES

Third parties preventing transactions

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

This is possible in certain special cases (eg, if a third party has a pre-emptive right).

Third parties supporting transactions

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

In principle, no.

UNSOLICITED OR UNWANTED PROPOSALS

Directors' duties

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 may decide on a proposal to enter into an M&A transaction without consulting the shareholders, unless the articles of association would provide otherwise.

In relation to listed companies, additional duties and responsibilities will apply further to the legislation in relation to public M&A (in particular, the Law of 1 April 2007 on public takeovers, the Royal Decree of 27 April 2007 on public takeovers and the Royal Decree of 27 April 2007 on squeeze-out bids).

Once the takeover bid has been made public by the Financial Services and Markets Authority (the relevant regulator), the target's board may issue a press release to disclose its opinion on the interest or the consequences of the bid for the target company, its shareholders and its employees. In any case, the director's duty to act in accordance with the interest of the company remains when receiving an unsolicited or unwanted proposal.

During the offer period, the directors must be particularly careful and must ensure that their actions, decisions and declarations do not compromise the corporate interest and the equal treatment and information of the shareholders.

The board can, under certain conditions, 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 articles of association and within the limits of the corporate interest. Defensive measures may be, for instance, the use of the authorised capital procedure or the acquisition of the company's own shares.

COUNTERPARTIES' CLAIMS

Common types of claim

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 disputes related to M&A transactions between counterparties relate to alleged breaches of the representations and warranties and to earn-out mechanisms.

Differences from litigation brought by shareholders

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 based on the underlying transaction documentation and are not necessarily decided in court. They can also be resolved by means of arbitration proceedings. Litigation brought by shareholders would be tort-based and, given the lack of a contractual basis and hence a lack of arbitration clauses, be brought in public courts.

UPDATES AND TRENDS

Recent developments

36 | What are the most current trends and developments in M&A litigation in your jurisdiction?

Warranty and indemnity insurance has recently gained ground in the Belgian market and may give rise to an increase in litigation against insurers.

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TYPES OF SHAREHOLDERS' CLAIMS

Main claims

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

According to PRC laws and legal practice, the main claims that shareholders raise against corporations in connection with M&A transactions include the following.

Inspection claims

To request for inspecting and copying meeting minutes of the shareholders meeting, resolutions of the board of directors in relation to the M&A transaction, and inspecting the company's accounting book etc.

Resolution-related claims

To request that the court declare that the shareholder or board resolution has not been established.

To request that the court declare that the shareholder or board resolution is invalid.

To request that the court revoke the shareholder or board resolution.

Claims for invalidation of contracts of the M&A transaction

The shareholder may request the court to declare the transaction documents are invalid because the parties to such transaction documents collude with each other and impairs the shareholder's rights and interests.

Repurchase claims

The shareholder who casts an opposing vote to the shareholder resolution in relation to the M&A transaction, including merger, division and transfer of main assets, such dissenting shareholder may request the court order the company to acquire his or her equity interests based on a reasonable price.

According to PRC laws and legal practice, the main claims that shareholders could raise against the corporations' directors and officers in connection with M&A transactions include the following.

Direct damage claim

In the event that a director or senior officer violates the laws and administrative regulations or the Articles of Association of the Company in M&A transactions and harms the shareholders' own interests, the shareholders may file a lawsuit and ask for compensation from the directors and officers.

Derivative damage claim

In the event that a director or officer violates the laws and administrative regulations or the Articles of Association of the Company in M&A transactions and harms the company's interests, the shareholders might file the lawsuits against such directors and officers on behalf of the company if the company fails to take action.

Requirements for successful claims

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

For each of the most common claims, the shareholder, in order to bring a successful suit, shall prove that he or she is a shareholder of the company at the time of filing the lawsuit. Besides, specific requirements for each claim are as follows.

Inspection claims

Before the suit, the shareholder shall submit a written request for inspection to the company. If the company reject the request, then the shareholder can bring a suit for inspection claims.

Claims for invalidation of contracts of the M&A transaction

The shareholder must prove that counterparties to M&A transactions collude with each other which impairs the shareholder's rights and interests.

Claims for invalidation of resolution

The shareholder must prove that the concerned resolution violates the mandatory provisions of any law or administrative regulation.

Claims to revoke resolution

The procedures for calling the meeting or the voting form of the concerned resolution violates any law, administrative regulation or the bylaw or the resolution itself violates the bylaw.

The shareholder must file the lawsuit within 60 days from the day when the resolution is made.

Repurchase claims

The shareholder voted against the M&A transaction in the general shareholders' meeting.

For shareholders of the limited liability company, the shareholder and the company fail to reach an agreement on the purchase of share within 60 days after the resolution is adopted at the shareholders' meeting.

For shareholders of the limited liability company, the shareholder must file the lawsuit within 90 days from the day when the resolution is adopted at the shareholders' meeting.

Direct damage claims

The shareholder must prove that any director or senior officer damages his interests by violating any law, administrative regulation, or the articles of association.

Derivative damage claims

The shareholder or shareholders shall prove that they meet the prerequisites in a derivative litigation.

The shareholder or shareholders shall prove that directors or senior officers cause damages to the company.

Publicly traded or privately held corporations

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. A listed company shall disclose information and ensure that the information disclosed is true, accurate, and complete. There shall be no false information, misleading statements, or major omissions. If false statements are made in an M&A transaction and cause losses to shareholders, shareholders may request compensation, while there are no such kind of regulations for non-listed companies.

Form of transaction

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

Yes.

There are mainly three forms of M&A transaction, namely, the asset sale (excluding in the form of share purchase), share purchase and the merger of companies. For a listed company, the takeover can be achieved through tender offer or agreed acquisition.

In most circumstances, the forms of the transaction do not affect the claims the shareholder may bring to the courts. However, there are several exceptions, for instance, a repurchase claim is unlikely to be raised under a tender offer M&A transaction because the form of M&A transaction does not need the approval of shareholders meeting, which will be a prerequisite for bringing a repurchase claim.

Negotiated or hostile transaction

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

No. Whether a transaction is reached through amicable negotiation or constitutes a hostile takeover has no influence on the type of claims the shareholders can raise under PRC law.

Party suffering loss

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

Yes. Some types of claims are brought only by shareholders, such as inspection claim, repurchase claim raised by the dissenting shareholders, claim to exercise preemptive right, derivative damages claim etc.

COLLECTIVE AND DERIVATION LITIGATION

Class or collective actions

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.

Representative action exists in China. Depends on the number of shareholders involved, it can be divided into two types of representative action.

The number of shareholders who suffered losses is certain then all the shareholders who suffered loss can recommend a representative.

If the exact number of shareholders who suffered loss is uncertain when the action is instituted, the court may publish a notice to describe the case and claims and notify shareholders to register within a certain period.

The shareholders who have registered may recommend a representative or representatives; and if no representative is recommended, the court may determine a representative or representatives in consultation with shareholders who have registered.

If the company has securities offerings and trading in China, an investor protection institution may, as authorised by 50 or more shareholders, participate in litigation as representatives and register with the court for the shareholders whose identity has been confirmed by the securities depository and clearing institution, unless the investor expressly expresses his or her unwillingness to participate in the litigation.

Derivative litigation

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.

If the company suffers losses due to director, senior officer or supervisor's violation of laws or administrative regulations or the Articles of Association of the company during an M&A transaction, its shareholders could bring derivative litigation on behalf of the company.

Only a shareholder who holds a minimum of 1 per cent shares for at least 180 consecutive days or shareholders who jointly hold a minimum of 1 per cent shares for at least 180 consecutive days are qualified to bring such derivative suits.

To bring the derivative suit, the following pre-conditions need to be satisfied:

- If it was directors or senior officers who caused harm to the company, the shareholder or shareholders may request in writing the board of supervisors or the sole supervisor to file a lawsuit against the directors or senior officers.
- If it was the supervisors who caused harm to the company, the shareholder or shareholders may request in writing the board of directors or the executive director to file a lawsuit against the supervisors.
- If the aforesaid board of supervisors or sole supervisor or the board of directors or executive director refuse to act, or fail to act within 30 days upon receipt of the written request by the shareholder or shareholders, or if the situation is so urgent that if a lawsuit is not filed, the company would suffer irrecoverable losses.

In the derivative suits, the company shall be listed as the third party.

INTERIM RELIEF AND EARLY DISMISSAL

Injunctive or other interim relief

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 courts may order a preservation (including property and behavior preservation) during the litigation procedure upon the plaintiff's request or at its own discretion, or before the procedure upon the interested party's request, when there is a potential risk of difficulties in enforcing the future judgement or causing irreparable losses to the requesting party.

The courts are very cautious when issuing the preservation order, especially with orders of pre-litigation preservation and behavior preservation.

However, it is more common to see the asset preservation order being issued by the courts during the litigation procedure. During an M&A transaction, the courts may order an asset preservation to freeze the shares being traded or freeze the bank accounts with money to be paid etc, resulting in the suspension of the transaction.

It is worth emphasising that if the plaintiff wrongfully applies for such preservation measure and causes losses to the defendant, the plaintiff shall make compensation to the defendant.

It is generally accepted that the courts may only rule on the claims the party asks for. In this regard, upon the party's request, the courts can enjoin the M&A transactions by nullifying the transaction or confirm whether the amendment of deal terms is in compliance with law. In other words, the courts do not have the discretion to make such judgment in the absence of the party's pleading.

Early dismissal of shareholder complaint

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

Yes. PRC is not a common law country and thus the common law type of disclosure or discovery procedure does not exist in PRC. However, the defendant of an M&A litigation may apply to a court for early dismissal (before the court hearing any issues on merits) based on the grounds including but not limited to:

- the plaintiff fails to prove that it is a qualified shareholder as defined by law or the company's articles of association;
- the plaintiff fails to meet the precondition of raising a derivative litigation;
- the plaintiff fails to bring the case before the court within the time limit as required by law to raise such claims; and
- the court lacks the jurisdiction to the claims alleged by the plaintiff, for instance:
    - there is an arbitration arrangement for the concerned claims;
    - the issue shall be addressed by the administrative authority;
    - the parties of a case involving foreign elements have previously reached a consent to exclusively bring the concerned claims to a foreign court;
    - a case involving foreign elements satisfies all the conditions for 'non-convenient jurisdiction' as defined by PRC laws.

ADVISERS AND COUNTERPARTIES

Claims against third-party advisers

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

Yes. If third-party advisers cause damages to the company in M&A transactions, shareholders can initiate a lawsuit against the third-party advisers for the company's interests through derivative litigation.

Besides, if the company is listed, shareholders suffering loss because of third-party advisers' false statement may bring claims against the third-party advisers.

Claims against counterparties

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

Yes. If the legitimate interest of a company is impaired and any loss is caused to the company, whether due to the counterparty or a third party, the shareholder can initiate a lawsuit against such party in derivative litigation.

If the counterparties to M&A transactions collude with each other and this impairs the shareholder's rights and interests, the shareholder can bring a claim to invalidate the M&A contracts.

LIMITATIONS ON CLAIMS

Limitations of liability in corporation's constitution documents

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 of the company allow that matters deemed necessary to the shareholders' meeting are included, provided that such matters do not violate mandatory laws and administrative regulations.

The articles of association are binding on the company, shareholders, directors and supervisors and senior officers (such as manager, vice manager, CFO and as defined in the articles of association).

If directors, supervisors and senior officers violate the articles of association and cause damages to the company, or to the shareholders, they shall be held liable to the company or the shareholders.

If the board resolution violates the articles of association and causes damages to the company, then the directors who consented to this resolution will be held liable toward the company.

Statutory or regulatory limitations on claims

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?

The shareholders may bring derivative suits on behalf of the company against directors and senior officers if they violate laws, administrative regulations and articles of associations and cause damages to the company.

However, only a shareholder who holds a minimum of 1 per cent shares for at least 180 consecutive days or shareholders who collectively hold a minimum of 1 per cent shares for at least 180 consecutive days are qualified to bring derivative suits when the following conditions are satisfied:

- if it was directors or senior officers who caused harm to the company, the shareholder or shareholders may request in writing that the board of supervisors or the sole supervisor file a lawsuit against the directors or senior officers;
- if it was the supervisors who caused harm to the company, the shareholder or shareholders may request in writing that the board of directors or the executive director file a lawsuit against the supervisors; and
- If the aforesaid board of supervisors or sole supervisor, the board of directors or executive director refuse to act, or fail to act within 30 days upon receipt of the written request by the shareholder or shareholders, or if the situation is too urgent that if a lawsuit is not filed, the company would suffer irrecoverable losses.

Common law limitations on claims

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

China is a civil law jurisdiction and does not apply common law rules. However, there is a tendency, especially since 31 July 2020, that some important court cases (such as cases issued by the Supreme People's

Court, cases decided to be guiding cases by the Supreme People's Court) are more likely (sometimes are required) to be followed by other Chinese courts.

In judicial practice, it is not rare for the Chinese courts to apply the business judgement rule when they decide whether the directors or senior management violate their fiduciary duty, in other words, if the court decides that the directors or senior management's behavior or decision complies with the business judgement rule, they could be relieved from liabilities arising from violating of their fiduciary duties.

STANDARD OF LIABILITY

General standard

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?

To hold the directors or senior officers liable, the following must be proved.

The existence of a violation

The directors or senior officers violate the provisions of laws, administrative regulations, the articles of association of the company, the duty of diligence or the duty of loyalty.

In the judicial practice, the duty of diligence is usually explained by the courts as directors and senior officers shall act for the best interests of the company, with the attention of a good faith manager and with the reasonable care of an ordinary prudent person when performing their duties.

In the judicial practice, the duty of loyalty is usually explained by the courts as directors and senior officers shall faithfully perform their duties, safeguard the interests of the company in case of any conflict between their own interests and those of the company, and shall not take advantage of their positions as directors and senior officers to seek gains for themselves or others at the expense of the company.

The existence of causation

The violation by the directors or senior officers causes damages to the shareholders.

The quantified damages

The amount of damages suffered by the shareholders.

Type of transaction

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

No. The standard remains unvaried. However, as PRC courts tend to apply the standard on a case-by-case basis considering all circumstances involved, different types of transaction involving different fact patterns may to some extent affect PRC courts' application of the standard.

Type of consideration

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

No. There are no specific legal provisions providing that different standards will be applied depending on the type of consideration being paid to the seller's shareholders in M&A transactions.

Potential conflicts of interest

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 requirements of proving violation, causation, damages remain the same.

However, where one or more directors or senior officers have potential conflicts of interest in connection with an M&A transaction, it might be easier to prove the existence of violation of laws, because the PRC law particularly provides that directors and senior management shall not use their affiliated relationship (relationship with an enterprise directly or indirectly controlled by them or any other relationship that may lead to a transfer of the interests of the company) to harm the interests of the company.

In addition, directors or senior officers will not be relieved from liabilities if they only argue that the transaction has complied with the procedure such as disclosure procedure required by the laws, administrative regulations or articles of association of the company.

Controlling shareholders

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 rateably with all shareholders?

No. The standard remains the same with these conditions.

However, under some circumstances, it might be easier to prove the existence of controlling shareholder's violation because PRC laws and administrative rules have special provisions regarding controlling shareholders, for example, the PRC laws requires the controlling shareholder shall not use its affiliated relationship (relationship with an enterprise directly or indirectly controlled by him or her or any other relationship that may lead to a transfer of the interests of the company) to harm the interests of the company. In addition, the controlling shareholder will not be relieved from liabilities if he or she only argues that the transaction has complied with the procedure, such as disclosure procedure required by the laws, administrative regulations or articles of association of the company.

INDEMNITIES

Legal restrictions on indemnities

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?

No, there is no specific rule to impose legal restrictions on a company's ability to indemnify, or advance the legal fees of, its officers and directors named as defendants.

M&A CLAUSES AND TERMS

Challenges to particular terms

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

Where a shareholder is not a party to the transaction documents, he or she might be qualified to challenge the particular clauses or terms on behalf of the company when the company's interest was harmed by this clause.

Where a shareholder is a party to the transaction documents, he or she is allowed to bring a lawsuit to challenge a particular clause in its own name.

Clauses are challengeable when they violate article 52 of the PRC laws (such as violating the mandatory laws and regulations).

In addition, if the compensation amount provided in the termination clause exceeds 30 per cent of the direct losses, then the opposing party may request the court to lower the amount.

PRE-LITIGATION TOOLS AND PROCEDURE IN M&A LITIGATION

Shareholder vote

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

In China's MA litigation, the influence of the shareholders' voting rights is relatively small. Even if the board of shareholders decide not to claim against the person damaging the interest of the company, the dissenting shareholders who solely or jointly hold more than 1 per cent of the company's shares for more than 180 consecutive days may bring claim through derivative suits on behalf of the company when certain preconditions are satisfied.

Insurance

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

According to the Code of Corporate Governance for Listed Companies issued by the China Securities Regulatory Commission, a listed company may purchase liability insurance for directors after approval by the general meeting, and this insurance shall not cover the liabilities arising in connection with directors' violation of laws, regulations or the articles of association. While it is not uncommon for listed companies to obtain directors' and officers' insurance, it remains relatively rare for private-owned companies to do so.

Burden of proof

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 makes the allegations. A party making the allegations typically is responsible for providing evidence in support of his or her allegations. Such a burden does not shift; however, in cases where documentary evidence is controlled by the other party and not available to the party making the allegations, the party making the allegations may request the court to order the party in control of such evidence to produce the evidence. If the court makes such an order and the party in control of such evidence fails to comply with the order, the court may draw adverse inference against the party in control of such evidence, finding the relevant factual allegation to be true.

Pre-litigation tools

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

Yes, shareholders can inspect a series of corporate records under Chinese Company Law, including financial records, shareholder meeting records, board resolutions, etc. While shareholders of a limited liability company have the right to inspect corporate accounting books, shareholders of a joint stock limited company are not entitled to do so. Furthermore, in the event of an emergency where it is likely that corporate books and records may be destroyed, lost or become difficult to obtain later on, shareholders may, prior to instituting a lawsuit, apply to the court to preserve the books and records.

Forum

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

Different jurisdictional rules apply to claims for different cause of actions.

A claim brought under Chinese Company Law can only be filed in the court at the domicile of the company, namely, the place where the company has its principal office, regardless of whether the court litigation forum selection clause contained in the corporate by-laws provides otherwise, which will be held invalid for a claim brought under Chinese Company Law.

A tort claim, for example, controlling shareholders, directors or senior executives causing detriment to the company's essential interests, may be filed either in the court of domicile of defendant or in the court of the place where the tort occurs or results, depending on where the plaintiff would like to file his or her claim.

A breach of contract claim shall be brought in venues selected by the court litigation forum selection clause agreed by the parties, to the extent that this forum selection clause is held valid by the court. Parties in the forum selection clause may only agree for their disputes to be revolved in forums from the following venues: (1) the place of domicile of the defendant; (2) the place where the contract is performed or signed; (3) the place of domicile of the plaintiff; (4) the place where the subject matter is located; and (5) any other place actually connected to the dispute to have jurisdiction over the dispute . Selecting forums in venues other than the ones listed above would be invalid. In the absence of any valid forum selection clause, the case shall be heard by the court at the place of domicile of the defendant or at the place where the contract is performed. Parties are also allowed to agree for M&A disputes to be decided by arbitration, to the extent that such arbitration agreement is held valid under the Chinese Arbitration Law.

Expedited proceedings and discovery

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

No, expedited proceeding applies only to cases with simple facts and undisputed issues, which naturally rules out M&A litigations. Likewise, there is no discovery proceeding in litigations conducted in accordance with the Chinese Civil Procedure Law. However, where relevant documentary evidence is under exclusive control of one party, the other party may apply to the court for ordering the production of such documentary evidence.

DAMAGES AND SETTLEMENTS

Damages

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

If the M&A litigation is a breach of contract claim, the amount of compensation to be paid shall be equivalent to the loss caused by the breach of contract, including any benefit receivable after the contract is performed, provided that it shall not exceed the loss that may be caused by the breach of contract which the breaching party has foreseen or ought to have foreseen at the time of conclusion of the contract.

If the M&A litigation is claiming that the M&A contract is null and void or has been revoked or has been determined as having no binding force, the actor who acquired property as a result of such act shall return the same; if it is impossible or unnecessary to return such property, compensation shall be paid at an estimated price. The party at fault shall compensate the other party for the loss it suffers as a result of the act; if both parties are at fault, they shall bear the corresponding responsibilities respectively.

If the M&A litigation is about infringement upon another person's property, the property loss shall be calculated according to the market price for the property when the loss is incurred or by other reasonable means.

Settlements

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

Prior to or during the litigation proceeding, parties may settle their disputes by negotiation or mediation. If the disputes are settled by mediation conducted in the court proceeding and the court renders a mediation award, the mediation award would be final and binding, and can be enforced by courts.

THIRD PARTIES

Third parties preventing transactions

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

Yes, third parties may do so if the agreed M&A transactions are in violation of mandatory provisions of laws and administrative regulations, against public interest, or for illegal purposes etc.

Third parties supporting transactions

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

No, but third parties may use litigation as a leverage to negotiate with others in relation to an M&A transaction.

UNSOLICITED OR UNWANTED PROPOSALS

Directors' duties

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 directors shall comply with laws, administrative regulations, and the articles of association and shall owe duties of fiduciary and due diligence to the corporation when the corporation receives an unsolicited or unwanted proposal to enter into an M&A transaction. In the case of taking over a list company, the directors of a target company bear the duties of loyalty and diligence to the company and shall treat all acquirers who take over of the company fairly. The decision made and measures adopted by the board of directors of the target company in respect of a takeover shall be beneficial to the safeguarding of the interests of the company and its shareholders; the board of directors shall not abuse its official powers to create inappropriate obstacles for a takeover, shall not use company resources to provide any form of financial assistance to the acquirer, and shall not undermine the legitimate rights and interests of the company and its shareholders.

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COUNTERPARTIES' CLAIMS

Common types of claim

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 are breach of contract and the enforcement of valuation adjustment mechanism provisions.

Differences from litigation brought by shareholders

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 is usually a breach of contract claim to which Chinese Contract Law will apply while litigation brought by shareholders usually alleges breach of fiduciary duties by officers and directors to which Chinese Company Law and Chinese Security Law would apply.

UPDATES AND TRENDS

Recent developments

36 | What are the most current trends and developments in M&A litigation in your jurisdiction?

In December 2019, the Supreme People's Court issued guiding opinions: Circular of the Supreme People's Court on Issuing the Summaries of the National Conference for the Work of Courts in the Trial of Civil and Commercial Cases, which, among others, clarified important issues on validity and performance of the valuation adjustment mechanism in M&A transactional documents and on share transfer.

* *The information in this chapter is accurate as at April 2021.*

Japan

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TYPES OF SHAREHOLDERS' CLAIMS

Main claims

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 that the court 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 (the 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, successful claims are quite rare.

Requirements for successful claims

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, 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 directors' decisions 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.

Publicly traded or privately held corporations

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.

Form of transaction

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.

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.

Negotiated or hostile transaction

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

No.

Party suffering loss

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 the directors' malicious intent or gross negligence, if shareholders themselves directly sustain damages arising out of a breach of the 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 owing 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 owing 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 this argument or not remains to be seen.

COLLECTIVE AND DERIVATION LITIGATION

Class or collective actions

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 the protection of consumers' interests, which are not relevant here). However, 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.

Derivative litigation

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 this 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 the 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 the 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.

INTERIM RELIEF AND EARLY DISMISSAL

Injunctive or other interim relief

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 of Japan, for mergers or other M&A transactions involving corporate reorganisations, such as spin-offs, 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 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. There was an M&A transaction in relation to which injunctive relief was sought by a competing bidder, but 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.

Early dismissal of shareholder complaint

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.

ADVISERS AND COUNTERPARTIES

Claims against third-party advisers

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

In theory, shareholders can bring these 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, these claims are extremely rare.

Claims against counterparties

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. 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.

LIMITATIONS ON CLAIMS

Limitations of liability in corporation's constitution documents

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. 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 higher.

Statutory or regulatory limitations on claims

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 that the company bring a claim against its directors, or 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. In the case of public companies, shareholders must have been a shareholder continuously for at least six months prior to making a demand for such a claim. Otherwise, there are no statutory or regulatory provisions that limit shareholders' abilities to bring claims against directors and officers in connection with M&A transactions.

Common law limitations on claims

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 buyouts or other transactions that involve conflicts of interest, the business judgment rule would be widely applied.

STANDARD OF LIABILITY

General standard

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?

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
- multiple independent third parties expressed a fairness opinion.

Type of transaction

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 this decision or the decision-making process extremely unreasonable. Nonetheless, the court stated that, even if the decision for conducting the management buyout 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 the duties of directors in management buyouts. It is also not clear whether this decision applies only to management buyouts, or whether it could extend to transactions involving conflicts of interest or further to transactions in which a transfer of value among shareholders would be disputed.

Type of consideration

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

It is not entirely clear whether the court applies a different standard of review depending on the type of consideration being paid.

Potential conflicts of interest

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

It is not entirely clear whether the court applies a different standard of review depending on potential conflicts of interest.

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 this decision or the decision-making process extremely unreasonable. Nonetheless, the court stated that, even if the decision for conducting the management buyout 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.

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Controlling shareholders

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 rateably with all shareholders?

It is not entirely clear whether the court applies a different standard of review depending on the 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 this decision or the decision-making process extremely unreasonable. Nonetheless, the court stated that, even if the decision for conducting the management buyout 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.

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INDEMNITIES

Legal restrictions on indemnities

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 of Japan provides specific rules for the company to discharge these 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 higher.

In addition, subject to certain requirements and limitations, officers and directors may enter into an indemnification agreement with the company whereby the company will indemnify them for any liability incurred in their performance of their duties in the absence of gross negligence or intentional misconduct and reimburse or advance their legal fees if they are named as defendants in M&A-related litigation.

M&A CLAUSES AND TERMS

Challenges to particular terms

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 the 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 this breach would normally be difficult, unless a favourable competing offer was actually made but prevented owing to the deal protection clauses. Injunctions based on improper deal protection clauses are even more difficult, as the grounds for injunctions are limited.

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

However, 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).

PRE-LITIGATION TOOLS AND PROCEDURE IN M&A LITIGATION

Shareholder vote

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.

Insurance

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 the 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 when 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. However, the Companies Act of Japan (the Companies Act) was recently amended with effect from March 2021 to permit the company to pay these insurance premiums for directors by clearly taking certain required procedures.

Burden of proof

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.

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, 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.

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

Pre-litigation tools

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 that the company make available for review, or provide copies of, minutes of board meetings. However, for the board minutes, if the company is one with statutory auditors or 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:

1 for purposes other than securing or exercising rights as a shareholder;
2 for disturbing the business of the company or otherwise impairing the common interests of shareholders;
3 for providing to third parties the facts ascertainable from the shareholders' register for consideration; or
4 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 that the company 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 (1) to (4) 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 that the court appoint an inspector to investigate the convocation procedures and the manner of the resolution of the shareholders' meeting.

Forum

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

Under the Companies Act of Japan, 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.

Expedited proceedings and discovery

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 that the court order the other party or any third party to produce a document to the court. The party requesting this 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 the 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 buyout that was not successful owing to improper involvement of the management that participated in the buyout; it was an extraordinary case that came about mainly because of a series of reports from whistle-blowers. 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 United States.

DAMAGES AND SETTLEMENTS

Damages

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.

Settlements

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 these cases, the court must notify the company of the description of the settlement and request that the company 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.

THIRD PARTIES

Third parties preventing transactions

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

Under the Companies Act of Japan, 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 the 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. Therefore, any damage sustained by the claimant 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.

Another notable transaction was the business integration between an Osaka based retailer, Kansai Super Market (Kansai Super), and another retailer, H2O Retailing (H2O). In 2021, injunctive relief was sought by a shareholder of Kansai Super regarding the business integration transaction with H2O. In this case, OK Corp, a discount supermarket chain was making a counteroffer for privatization of Kansai Super and challenged the approval by shareholders of the business integration, alleging that Kansai Super inappropriately changed the voting of a shareholder from an abstention to an affirmative vote. The district court accepted OK Corp's arguments and granted a temporary injunction against the business integration. However, the Osaka High Court reversed the decision and determined that the treatment of the vote in question appropriately and accurately reflected the intent of the shareholder and therefore the approval of shareholders was not in violation of law nor significantly inappropriate. The high court's decision was upheld by the Supreme Court.

Third parties supporting transactions

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. 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 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.

UNSOLICITED OR UNWANTED PROPOSALS

Directors' duties

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 have been quite rare in Japan; however, Japanese corporate culture is slowly changing with the decrease of cross shareholding arrangements among companies and in the wake of enhanced corporate governance as well as changes in investment policies of Japanese institutional investors. As a result, the number of unsolicited takeover attempts has been increasing in the past few

years and some of them were successful although there is still 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 acquisition rights to a friendly third party with the aim of 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 these 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 acquisition rights to all shareholders that are only exercisable by shareholders other than the hostile offeror as long as this allotment is necessary and appropriate to protect the common interests of shareholders from the probable damage to be caused by the hostile offeror.

Japanese litigation over M&A defensive measures had a remarkable year in 2021, as there were four cases in which courts ruled on the validity of defensive measures taken in the face of a hostile takeover attempt. We will discuss the recent trends in the following section.

COUNTERPARTIES' CLAIMS

Common types of claim

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 the 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. However, 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 from such breach, owing to the limited number of these precedents there remains a number of issues with respect to which the court's position is unclear.

Differences from litigation brought by shareholders

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, the asymmetry of information would not normally be a critical issue.

UPDATES AND TRENDS

Recent developments

36 What are the most current trends and developments in M&A litigation in your jurisdiction?

Despite the increase in hostile takeover attempts over the last few years, none of the hostile takeover cases had escalated to court proceedings until recently. As noted earlier, however, there were four cases in 2021 in which courts ruled on the validity of defensive measures taken in the face of a hostile takeover attempt. In these cases, the target company implemented a defensive plan that prescribed measures that must be followed by an offeror making an unsolicited offer, and the target company resolved to issue stock acquisition rights in response to the hostile takeover attempt or acquisition of substantial shares in the market. The stock acquisition rights included discriminatory exercise conditions that precluded exercise by the hostile offeror and had a dilutive effect on the hostile offeror's voting rights. The hostile offerors in these cases initiated claims for injunctive relief. In three of the cases (*NIPPO*, *FUJI KOSAN*, *Tokyo Kikai Seisakusho*), the court ultimately refused to grant injunctive relief, whereas in the *Japan Asia Group* case, the court granted injunctive relief and that hostile takeover was successful.

In the cases where the court refused to grant injunctive relief, the court determined that the defensive measures were primarily aimed at ensuring sufficient information and time necessary for shareholders to make an informed decision with regard to the unsolicited offer as opposed to maintaining management autonomy, and that the offeror would have been able to avoid any detriment caused by the issuance of stock acquisition rights had it followed the procedures prescribed in the defensive plan. Further, shareholders had approved either or both the implementation of the defensive plan and the issuance of the stock acquisition rights, and thus the defensive measures reflected the reasonable intent of the shareholders. On the other hand, in the *Japan Asia Group* case, the court granted injunctive relief because neither the implementation of the defensive plan nor the issuance of the stock acquisition rights had been approved by shareholders. The court, in that case, determined that a decision of a special committee can supplement the decision of the board, but it cannot be a substitute for shareholder approval, and the offer had not been particularly coercive.

While it is important to look carefully at the background of each of these cases and the details of courts' decisions so as not to oversimplify the results, the most important factor in determining the likelihood that a court will uphold a defensive measure would appear to be the existence of shareholder approval of the implementation of the defensive plan and (or) the issuance of the stock acquisition rights. On this point, NIPPO obtained shareholder approval upon implementation of the defensive plan, which was in advance of receiving the hostile offer, but FUJI Kosan and Tokyo Kikai implemented a defensive plan only after receiving the hostile offer and their defensive plans targeted the specific offer (as opposed to covering any offer that meets the requirements set out in the defensive plan). In the *FUJI Kosan* case, the board of FUJI

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Kosan requested the offeror to extend the tender offer period to allow FUJI Kosan to hold a shareholders meeting regarding approval of the implementation of the defensive plan and issuance of stock acquisition rights in accordance with the plan, but the offeror rejected that request. Therefore, the board of FUJI Kosan resolved to issue the stock acquisition rights in accordance with the defensive plan without obtaining prior approval of the shareholders. Although shareholder approval had not yet been obtained at the time of its decision, the Tokyo District Court did not grant injunctive relief partly because the defensive plan was implemented on the premise that shareholder approval would be obtained prior to the issuance of the stock acquisition rights, and FUJI Kosan contemplated holding a shareholders meeting. In the *Tokyo Kikai* case, as the hostile offeror already held a substantial shareholding of more than one third, the target company set the requirement for adoption of the shareholder resolution at a majority of all shareholders other than the hostile offeror and those parties acting in concert with the offeror as determined by the special committee, and that mechanism was upheld by the court. The full extent to which courts will weigh shareholder approval in these types of cases remains to be seen, and we do expect to see more litigation of these issues.

Mexico

Ernesto Saldate del Alto*

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TYPES OF SHAREHOLDERS' CLAIMS

Main claims

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

In Mexico, the main claims shareholders may assert against corporations, officers and directors in connection with mergers and acquisitions transactions are: forced fulfilment of the contract, (this is the main claim in courts in this jurisdiction); termination of the contract; and (the most important) payment of damages. With regard to damages more and more conciliation agreements are made during the first phases of the claim when the early notification arrives to the litigated party from the courts.

Requirements for successful claims

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

To be successful against corporations, officers and directors in connection with mergers and acquisitions transactions for the main claims of forced fulfilment of the contract, termination of the contract and payment of damages, the shareholders must show the correct and legal incorporation of the company, as well as legal representation and finally, the base agreement or contract supporting the action to be brought supporting the scope of the claim.

Publicly traded or privately held corporations

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 types of claims that shareholders can file do not differ depending on whether the corporations involved are publicly traded or private but the share price is usually monitored on time before and after the merger and acquisition transaction to check the future projections that were analysed prior to the operation. To do so, financial statements of the issuers that are part of the transaction are analysed; the market price of the share is analysed according to the performance of the assets owned by the companies and the growth expectations, making a map of the growth value where the issuers are distributed in zones, and the strategy followed is assessed, indicating the most promising variables for creating value. These do not affect the type of claim between a public company and a private company.

Form of transaction

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

Yes. The types of claims that shareholders can present differ according to the form of the transaction because it depends on the type of claim to be presented. In other words, merger, public offering, sale of assets, purchase of shares are totally different so the claim is prepared for each scenario according to each specific case. Even so, operations within the same industry must also be analysed in detail, since a merger, a public offering, a sale of assets and a purchase of shares do not resemble each other. All of these are aspects that must be taken into account when making a claim regarding the transaction in question.

Negotiated or hostile transaction

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

The type of claim differs depending on whether the transaction involves a negotiated transaction versus a hostile or unsolicited offer, since the way in which the claim will be made will depend on the legal position of the hostile party. However, there may be alternative means prior to litigation or in its early stages that will help negotiations such as arbitration that may dampen the hostile environment between the parties. There are lawyers and specialised organisations to carry out these approaches between the parties, however, if the hostile party does not yield the claim, it may contest the interests of the latter with great force.

Party suffering loss

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

Yes, because the type of corporation and the way in which it was incorporated have an influence on the way the demand is managed, therefore the liabilities may be different for the shareholders versus the corporation.

COLLECTIVE AND DERIVATION LITIGATION

Class or collective actions

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?

With respect to collective litigation, it is possible if they file claims on behalf of other shareholders in a similar situation. In that case, the

way to present it is to appoint a legal representative of the rest of the shareholders and go to court to present their claim for the involvement of several of them with the sole representation of the selected one. This could end up suspending or stopping the merger and acquisition transaction if the involvement of several of the shareholders or any of the parties is proven.

Derivative litigation

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 may file derivative litigation on behalf of corporations when the corporation suffers a loss in connection with a merger and acquisition transaction. The procedure that is applied for these actions is the standard one, being able to stop or suspend the merger and acquisition transaction in the event that the corporation or some of the shareholders agree to present the case before the courts, arguing with facts and evidence that the loss will be imminent, which is why they want to intervene for the good of their interests.

INTERIM RELIEF AND EARLY DISMISSAL

Injunctive or other interim relief

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 basis for a court to award injunctive or other interim relief to prevent the closing of a merger and acquisition transaction is that the possibility of granting this measure is recognised in the law and it is legally requested to the judge. Courts can enjoin mergers and acquisition or modify deal terms, but it is necessary to substantiate the cause of the prohibition, the negative consequences that the merger could have and the violation of rights that this would generate.

Early dismissal of shareholder complaint

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

Mexican law allows defendants to seek early dismissal of a shareholder complaint prior to disclosure or discovery but to request dismissal in this legislation it is necessary to go through the entire jurisdictional process to obtain a judgment in that direction.

ADVISERS AND COUNTERPARTIES

Claims against third-party advisers

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

Shareholders may file claims against external advisers who are or have assisted in or during mergers and acquisitions transactions. This will be possible when it can be shown that they have given unfair opinions or when external advisers act in an inappropriate and unethical way, and any point will have to be proved with facts and not just sayings. Some other examples include, but are not limited to, the intervention of the advisers offering confidential information to the counterpart to benefit the negotiation or to the competition in the industry in which the companies that will carry out the merger and acquisition operate. Thus, there may be many possible acts that cause an outside advisor to engage in this type of behaviour.

Claims against counterparties

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

Yes. The shareholders of one of the parties can file claims against the counterparties in merger and acquisition transactions, such as, for example, for helping and inciting the breach of fiduciary duty, among others. The mergers and acquisitions transaction process must be carried out in accordance with the provisions of the law and it is totally permissible that if any of the parties realise that there is a different intention to fulfil the transaction, they are within their right to present claims before the authorities that enforce their rights and obligations to the other party.

LIMITATIONS ON CLAIMS

Limitations of liability in corporation's constitution documents

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?

There are different impacts to the extent board members or executive's libels in connection with merger and acquisitions transactions regarding the way the corporation was constituted. As an example, if the incorporation were made without limitation of shareholders liabilities, as would be the case of the Sociedad Anonima de Capital Variable (S A de C V corporation), which is the majority of the companies incorporated under Mexican law. It is also necessary to take into account when the S A de C V corporation becomes a regulated company of the Mexican financial system since there are legal provisions that they must comply with within corporate governance.

Statutory or regulatory limitations on claims

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?

Yes, there is a legal provision that limits the ability of shareholders to file claims against directors and officers in relation to merger and acquisition transactions. In general, it is essential that the majority of the shareholders, considering a majority at 51 per cent, must provide authorisation in the board of directors and be signed before a notarised act so that the act approved to file a claim is recorded, otherwise it is not possible to present claims against directors and officers in relation to mergers and acquisitions transactions (if it is not established in the minutes of the meeting of the board of directors which, as mentioned, must be notarised before a public notary).

Common law limitations on claims

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, it is possible that the common law rules that impair shareholders ability to bring claims against board members or executives in connection with merger and acquisitions limit their action in the courts as a 'business judgement rule' under which courts will decline to second-guess informed and reasonable business decisions.

STANDARD OF LIABILITY

General standard

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?

The standard for determining whether a board member or executive may be held liable to shareholders in connection with a merger and acquisition transaction is the degree of responsibility and participation in the merger and or acquisition.

Type of transaction

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

The M&A transactions carried out in Mexico do vary in standard according to the type of transaction in question, that is, a merger of equals with a strategic partner will be different from a sale to a financial sponsor or a privatisation with a majority shareholder or an auction of the company; each and every one of them is different and will have an impact on the clauses of the contract between the parties that later can settle disputes.

Type of consideration

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

It very much depends on whether the consideration that the seller's shareholders will receive is in cash or in shares of the selling company. These are the guidelines and agreements that are developed as the due diligence progresses to achieve and further the general interests of the shareholders of both parties.

Potential conflicts of interest

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 an M&A transaction where one or more directors or officers have possible conflicts of interest, the standard of the transaction is totally affected by or that prior to the agreement between the parties, it must first analyse, decide and resolve that possible agreement to continue with the transaction. Generally within the same body of the merger and acquisition contract, clauses that prevent future possible conflicts of interest are considered, preventing future events and if they occur, the means of action are planned to resolve them without affecting the standard of the transaction.

Controlling shareholders

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 rateably with all shareholders?

In principle there is no variation in the standard if a controlling shareholder is part of the transaction or is receiving a consideration in relation to the transaction that is not shared proportionally with all shareholders since there is no specialised treatment against a merger and acquisition transaction.

INDEMNITIES

Legal restrictions on indemnities

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 Federal Labour Law in Mexico fully covers the worker regardless of the hierarchy that the person has within the corporation. However, if the employee with the position of director or officer is sued, payments are usually suspended and these are recalculated to form part of a lawsuit. If the affected person is the winner in the court trial, the authority usually asks the affected person for financial compensation in addition to re-establishing lost wages and restitution in their original job, thus initiating another phase of lawsuit that can take more than three to five years in litigation.

M&A CLAUSES AND TERMS

Challenges to particular terms

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

It is permissible that shareholders challenge particular clauses or terms in merger and acquisition transaction documents like the termination fees, standstills, no shop or no talk clauses or other terms that tend to preclude third party bidders.

PRE-LITIGATION TOOLS AND PROCEDURE IN M&A LITIGATION

Shareholder vote

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

The impact that a shareholder has regarding his or her vote on merger and acquisitions need to be analysed first, and from there the scope of the transaction must be determined.

Insurance

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

The digital economy has been taking space in the merger and acquisition industry in Mexico as well as in other countries, especially the ones with start-ups and fintechs, which are now key for the growing of the economy; this is a specific example in which the directors and officers play a main important role for the success of the new venture, therefore life insurance and other kind of insurances are part of the benefit package negotiated in these types of transactions.

Burden of proof

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?

Generally, the burden of proof falls on the party making the claim or demand regardless of whether this party is the shareholders, members of the board of directors or officers; this changes according to the process where the moment is clearly established, during a litigation, who must present evidence and arguments that will help to dispel the controversy between the parties.

Pre-litigation tools

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

There are some mechanisms that act as pre-litigation tools and that allow shareholders to have the possibility of investigating possible claims against members of the board of directors or executives; For example, during the stage of the preparatory means of the trial it is possible to obtain said information by going to the corresponding instances; It is also possible to consult databases at the national level to detect if there is a claim of which the civil servant, officer or administrative counsellor has not yet been notified with the claim personally or specifically. However, the most important thing is that each specific case must always be reviewed and analysed in order to arrive at an action strategy individually, that is, on a case-by-case basis in order to prepare the litigation before the court.

Forum

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

Yes. It is a common clause that is part of each contract between parties including the merger and acquisition contracts. This clause that usually is one of the last ones inside the document to mention the jurisdictional, which in case of any controversy all parties must attend: the jurisdiction is previously agreed between parties and then just written inside the merger and acquisition document.

Expedited proceedings and discovery

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

No, expedited proceedings and discovery in merger and acquisitions transactions are not allowed in Mexico.

DAMAGES AND SETTLEMENTS

Damages

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

There are many ways to estimate the amount of damages in a merger and acquisition litigation in Mexico, one of the main ones is based on the amount of the economic damage suffered by the claiming party; it is important to demonstrate in front of a court how this amount was calculated and the amount must be accompanied by documents that support the amount like invoices, contracts, etc.

Settlements

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

It is important to conduct due diligence to review the main factors that will impact the merger and acquisition, like finance analysis, operational and processes review, marketing strategy, as well as the human resources that both parties have in their organisation to understand what special issues will need to be analysed in detail and addressed to reflect a contract between parties that in the event of any breach of clauses, each party will be ready for.

THIRD PARTIES

Third parties preventing transactions

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

Yes, in some cases other interested financial or strategic buyers can bring to litigation to break up or stop an agreed merger and acquisition transaction prior to closing. In these cases, the third party that wants to stop the transaction must demonstrate their main interest and why it will be affected if the M&A transaction occurs.

Third parties supporting transactions

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

No, third parties in Mexico cannot use litigation to force or pressure corporations to enter into merge and acquisition transactions for any reason.

UNSOLICITED OR UNWANTED PROPOSALS

Directors' duties

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?

When a director receives an unsolicited or unwanted proposal to carry out a merger or acquisition transaction, he or she must, in accordance with the duties and responsibilities that the receiving company has entrusted to him or her, make immediate contact with the board of directors. The company's lawyers must be consulted and the appropriate precautions and measures taken to protect the interests of the shareholders.

COUNTERPARTIES' CLAIMS

Common types of claim

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

Besides shareholders claims, the most common types of claims asserted by and against counterparties to a merger and acquisition transaction are breach of contract, breach of representation and warranties, purchase price adjustment, earn-out claims and other third parties that go to the authorities to claim for the monopoly that has been created as a result of the union of two companies and that affect the interests of the competition of third parties, thus causing claims.

Differences from litigation brought by shareholders

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

The main difference is that the shareholder watches over his or her individual interest within the company of which he or she is a partner as opposed to the interests of the company as a whole in accordance with its strategy and short, medium, and long-term objectives.

UPDATES AND TRENDS

Recent developments

36 What are the most current trends and developments in M&A litigation in your jurisdiction?

The main trends and developments in M&A litigation in Mexico are that recently they were down due to the pandemic, since the illiquidity of companies began to affect their credit levels, so companies began to look for with whom to merge and thus survive the situation. They later began to increase with the boom that the fintech industry and start-ups have recently had, since they have fresh capital and resources obtained by their capital rounds for rapid growth as digital services are what the market currently demands. The sum of all these factors impacted M&A litigation due to lack of compliance with the implementation strategy, obtaining the promised human resources that have the intellectual capital to develop the business, the impact of the regulation for mergers in the financial system. Although millionaire mergers had been agreed by the fintech regulation, these have not been possible or those that did received fines from the authorities, thus causing conflicts between the merged parties.

* *The information in this chapter is accurate as at April 2021*

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TYPES OF SHAREHOLDERS' CLAIMS

Main claims

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

A member may apply under section 215H of the Companies Act (Cap 50) (the Companies Act) for an M&A transaction to be halted if the Court is satisfied that the said transaction would unfairly prejudice the member.

If the officers and directors of a company are also the majority shareholders of the company, the minority shareholders may file a claim for oppression under section 216 of the Companies Act.

If a shareholder is concerned that in causing the company to enter into an M&A transaction, the director or directors had caused damage to the company, the shareholder may commence a derivative action pursuant to section 216A of the Companies Act or under common law against the director or directors.

Requirements for successful claims

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

For a claim under section 215H of the Companies Act, the shareholder must show that he or she has been unfairly prejudiced by the proposed M&A.

For a claim in oppression under section 216 of the Companies Act, a minority shareholder must show that there has been commercial unfairness, in that there has been a visible departure from the standards of fair dealing which a shareholder is entitled to expect: see, for example, *Ascend Field Pte Ltd and Others v Tee Wee Sien and another appeal* [2020] 1 SLR 771 [not in the context of an M&A activity].

To commence a derivative action, which is to bring an action on behalf of the company, the shareholder first must obtain leave from the Court. To obtain leave to commence a statutory derivative action under section 216A of the Companies Act, an aggrieved shareholder must provide proper notice (at least 14 days unless it can be established that it is not practicable or expedient to do so) to the directors of the company before commencing the action. The shareholder must also show that he or she was acting in good faith, and that it appears, on first impression, to be in the interests of the company that the action be brought. See, for example, section 216A(3) of the Companies Act and also *Tiong Sze Yin Serene v HC Surgical Specialists Ltd and another* [2020] SGHC 201 [not in the context of an M&A activity].

To obtain leave to commence a common law derivative action, an aggrieved shareholder must show that the company has a reasonable or legitimate case against the defendant for which the company may recover damages or otherwise obtain relief, and that the alleged wrongdoer has committed fraud against the company and is in control of the company. Further, the aggrieved shareholder must show that the action is brought in good faith in the best interests of the company, rather than for some ulterior or purely self-serving purpose. See, for example, *Sinwa SS (HK) Co Ltd v Nordic International Ltd and another* [2016] 4 SLR 320 [not in the context of an M&A activity].

Publicly traded or privately held corporations

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?

Generally speaking, no. That said, companies listed on the Singapore Exchange (SGX) are subject to further rules and regulations including those set out in the SGX-ST Listing Manual (Listing Manual).

Further, under section 25(1) of the Securities and Futures Act (Cap 289), the Court may, on an application of the SGX, make an order to compel a person to comply with rules stated in the Listing Manual. Failure to comply with such an order without reasonable excuse is an offence.

Form of transaction

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

No, they do not.

Negotiated or hostile transaction

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

No, they do not.

Party suffering loss

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

Yes. A minority shareholder can commence an action for oppression only if the loss is suffered in his or her capacity as a shareholder. He or she cannot sustain a claim for oppression if the damage is suffered by the company.

The 'proper plaintiff' rule in *Foss v Harbottle* (1843) 2 Hare 461 provides that the proper plaintiff to seek redress for a wrong done to a company is, at first glance, the company itself. The corollary of this is the 'no reflective loss' principle. Where the minority shareholder's loss is merely a reflection of the loss suffered by the company, which would be made good if the company were able to and did enforce its rights, the proper party to recover that loss is the company and not the

shareholder. See *Suying Design Pte Ltd v Ng Kian Huan Edmund and other appeals* [2020] 2 SLR 221 (*Suying Design*) (not in the context of an M&A activity).

In cases of corporate wrongs suffered by the company, a shareholder may, assuming he or she obtains the necessary leave, only sue by commencing a common law or statutory derivative action, or both. See, for example, *Suying Design*.

COLLECTIVE AND DERIVATION LITIGATION

Class or collective actions

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?

Such shareholders may consider pursuing an action under Order 15 rule 12 of the Rules of Court (Cap 322, R 5) (Rules of Court). Generally speaking, this process allows a large number of people to be (indirectly) involved in the litigation. Under this rule, one or more persons of a 'class' of people may commence or defend a claim on behalf of themselves and other members of that 'class' as long as the 'common interest' in the said proceeding can be established to the court's satisfaction. See, for example, *Management Corporation Strata Title Plan No 3322 v Mer Vue Developments Pte Ltd* [2016] 4 SLR 351. (Not in the context of an M&A activity).

Derivative litigation

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. If the directors refuse to sanction an action against the wrongdoer who had inflicted damage on the company, shareholders may, assuming they obtain the necessary leave, commence either a statutory derivative action (pursuant to section 216A of the Companies Act) or a common law derivative action to bring an action in the name of the company against the wrongdoer.

INTERIM RELIEF AND EARLY DISMISSAL

Injunctive or other interim relief

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 wide ranging powers and discretion. Under section 160 of the Companies Act, notwithstanding anything in a company's constitution, the directors shall not carry into effect any proposals for disposing of the whole or substantially the whole of the company's undertaking or property unless those proposals have been approved by the company in general meeting. The Court may, on the application of any member of the company, restrain the directors from entering into such a transaction.

The Court may halt an M&A transaction under section 215H of the Companies Act if it is satisfied that the said transaction would unfairly prejudice the member. Under section 215H(1)(b) of the Companies Act, the Court may also make an order to modify the M&A proposal.

Under section 4(10) of the Civil Law Act (Cap 43), the Court also has broad powers to grant an injunction as it thinks just in all cases which appears to the court to be 'just or convenient that such order should be made'.

Under section 409A of the Companies Act, a shareholder may apply for an injunction against a person who has engaged, is engaging or is proposing to engage in any conduct that constituted, constitutes or would constitute a contravention of the Companies Act. This could occur in cases involving the transfer of assets at undervalue between two companies with a common board of directors. See also *Tang Yoke Kheng (trading as Niklex Supply Co) v Lek Benedict and others* [2004] 3 SLR(R) 12, which cited *Allen v Atalay* (1993) 11 ACSR 753 (not in the context of an M&A activity).

Early dismissal of shareholder complaint

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

Yes. In an action commenced by a writ of summons, the defendants may strike out a shareholder's claim under Order 18 rule 19 of the Rules of Court if they can show that the claim:

1 discloses no reasonable cause of action or defence, as the case may be;
2 is scandalous, frivolous or vexatious;
3 may prejudice, embarrass or delay the fair trial of the action; or
4 is otherwise an abuse of the process of the Court.

That said, the bar to a successful striking-out application is often quite high. See, for example, *Qroi Ltd v Pascoe, Ian and another* [2019] SGHC 36 (not in the context of an M&A activity).

ADVISERS AND COUNTERPARTIES

Claims against third-party advisers

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

Yes. Shareholders may, assuming they obtain the necessary leave, bring either common law or statutory derivate actions to commence proceedings against third-party advisers in the name of the company, if the third party-advisers had acted in breach of their duties (legal or equitable, or both) to the company.

Claims against counterparties

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

Such claims are very rare because it is often the company that sues the counterparty. If the counterparty to the M&A transaction has wronged the company, the shareholders may, assuming they obtain the necessary leave, bring a derivative action to commence proceedings against the counterparty on the company's behalf.

Further, under section 409A of the Companies Act, a shareholder may apply for an injunction against a person who has engaged, is engaging or is proposing to engage in any conduct that constituted, constitutes or would constitute a contravention of the Companies Act. This could occur in cases involving the transfer of assets at undervalue between two companies with a common board of directors.

LIMITATIONS ON CLAIMS

Limitations of liability in corporation's constitution documents

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 section 172(1) of the Companies Act, any provisions that purport to exempt an officer of a company (to any extent) from any liability that would otherwise attach to him or her in connection with any negligence,

default, breach of duty or breach of trust in relation to the company is void. However, the corporation is at liberty to purchase insurance for the officer or officers, subject to certain limitations set out at section 172B of the Companies Act.

Statutory or regulatory limitations on claims

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?

Time bar is often used as a limitation to bring such claims. If the cause of action for the damage suffered by the corporation as a result of wrongdoing by the directors and officers has been time-barred under the Limitation Act (Cap 163), then the shareholders may not be able to commence a derivative action for the same on behalf of the company.

Common law limitations on claims

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 the common law in Singapore, shareholders may only bring claims for wrongs suffered in their personal capacity as shareholders. Where the company suffers damage due to wrongdoing by the officers of the company, shareholders would not be able to sue the said officers, unless they seek leave to bring a derivative action. See, for example, *Suying Design*.

STANDARD OF LIABILITY

General standard

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?

If a board member is sued in his or her capacity as a shareholder for minority oppression under section 216 of the Companies Act, he will be held liable to the minority shareholder or shareholders if the claim is proved against him or her on the balance of probabilities.

Generally speaking, a director has a duty to at all times act honestly and use reasonable diligence in the discharge of the duties of his or her office (section 157 of the Companies Act). The director must act in the best interests of the company. See *Beyonics Asia Pacific Ltd and others v Goh Chan Peng and another* [2020] 4 SLR 215. However, a director is generally regarded as not owing any fiduciary duties to the shareholders of the company. See, for example, *Tan Kim San and another v Lim Cher Kia* [2000] 3 SLR(R) 892 (*Tan Kim San*). However, a director may owe a fiduciary duty to shareholders if there is a relationship of trust and confidence. Whether such a relationship arises is dependent on the circumstances of the particular case.

Type of transaction

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

No, it does not.

Type of consideration

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

No, it does not.

Potential conflicts of interest

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, it does not. A director owes duties under common law and statute (section 156 of the Companies Act) to avoid any conflict of interest. Under section 156 of the Companies Act, every director or chief executive officer of a company who is in any way, whether directly or indirectly, interested in a transaction or proposed transaction with the company, must disclose such an interest. Further, if the company is listed on SGX, the Listing Manual provides for the disclosure of an interested person transaction. A public listed company must make an immediate announcement under Rule 905 of the Listing Manual if there is an 'interested person transaction.'

Controlling shareholders

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 rateably with all shareholders?

No, although practically speaking, such a transaction would invite more scrutiny.

INDEMNITIES

Legal restrictions on indemnities

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 172(2) of the Companies Act, any provisions by which a company directly or indirectly provides an indemnity (to any extent) for an officer of the company against any liability attaching to him or her in connection with any negligence, default, breach of duty or breach of trust in relation to the company is void. However, that does not prevent the company from purchasing insurance for the officer or officers for such liability.

While section 172(2) of the Companies Act does not apply where the indemnity is against liability incurred by that officer to a person other than the company, section 172B of the Companies Act bars the provision of any indemnity for, among other things:

1 The liability of the officer in paying a fine in criminal proceedings or a penalty incurred as in respect of non-compliance with any requirement of a regulatory nature.
2 The liability incurred by the officer in defending criminal proceedings in which he or she is convicted, defending civil proceedings brought by the company or a related company in which judgment is entered against him or her.

Under section 163A of the Companies Act, a company can loan monies to a director for court proceedings. However, such loan must be repaid according to the terms set out at section 163A(2), which include, among other things, the requirement that the loan be paid within 14 days upon judgment or conviction being rendered against the director.

Under section 163B of the Companies Act, a company can loan funds to a director to meet expenditure incurred or to be incurred in defending himself or herself in an investigation by a regulatory authority or against any action proposed to be taken by a regulatory authority in connection with any alleged negligence, default, breach of duty or breach of trust by him or her in relation to the company.

M&A CLAUSES AND TERMS

Challenges to particular terms

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

Whether a shareholder can make such a challenge depends on, for example, the constitution and the exact terms of the M&A transaction documents.

In an application under section 215H of the Companies Act, shareholders may be able to do so on the ground that the terms are unfairly prejudicial to their interests.

PRE-LITIGATION TOOLS AND PROCEDURE IN M&A LITIGATION

Shareholder vote

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

Under section 160 of the Companies Act, notwithstanding anything in a company's constitution, the directors shall not carry into effect any proposals for disposing of the whole or substantially the whole of the company's undertaking or property unless those proposals have been approved by the company in general meeting.

In the course of an M&A, the directors may issue shares of a company. However, the directors cannot do so without approval of the company in a general meeting, pursuant to section 161 of the Companies Act.

Under common law, if a shareholder resolution ratifies the actions of an officer, it is unlikely that any derivative action against the said officer for the same actions will succeed, unless the resolution is subsequently set aside.

Insurance

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

Under section 172(2) of the Companies Act, the company is permitted to purchase insurance for a director or officer for liability attaching to him or her in connection with any negligence, default, breach of duty or breach of trust in relation to the company.

The company may also purchase insurance for the directors and officers in relation to liability to third parties, subject to the restrictions set out at section 172B of the Companies Act.

Burden of proof

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 plaintiff bears the legal burden to establish his or her case on a balance of probabilities. However, the evidential burden shifts between the plaintiff and the defendant constantly during the trial process. See, for example, *Britestone Pte Ltd v Smith & Associates Far East, Ltd* [2007] 4 SLR(R) 855e at [58] (not in the context of an M&A activity).

Pre-litigation tools

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

Under section 175 of the Companies Act, a company must hold an annual general meeting (AGM). During this said AGM, shareholders may raise questions to be answered by the board members or executives of the company. Under section 189 of the Companies Act, a shareholders may also request to inspect the minute books of the company.

Based on the response provided by the executives during the AGM or from an inspection of the minute books, the shareholders may enquire further to understand the affairs of the company.

Shareholders may also write in to ask questions about the affairs of the company, and if the shareholders are of the view that some wrongdoing may have been committed by directors or executives of the company, they can seek advice on the necessary legal recourse.

Generally speaking, Singapore civil procedure also provides for pre-action discovery.

Forum

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

No, subject to any arguments concerning forum non conveniens.

Expedited proceedings and discovery

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

A court in exercising its inherent case management powers may expedite proceedings and discovery.

Under Order 18 rule 22 of the Rules of Court, either party in civil proceedings may apply for the action to be tried without pleadings, which would expedite proceedings. However, such a rule is rarely invoked.

Singapore civil procedure also provides for pre-action discovery.

Common discovery issues would arise in relation to access to documents such as the transactional documents and communication between the relevant parties leading up to the transactions. In the determination of such issues, the party against whom discovery is sought may raise issues of legal privilege to justify why disclosure ought not to be ordered.

DAMAGES AND SETTLEMENTS

Damages

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

In minority shareholder oppression actions, the Court may, under section 216(2) of the Companies Act, make an order to vary or cancel any transaction, an order for the majority shareholder to buy out the minority shareholder (or vice versa), an order for derivative action or actions to be brought on behalf of the company or an order for the company to be wound up. However, damages might not be awarded in a minority-oppression action. See, for example, *Yeo Hung Khiang v Dickson Investment (Singapore) Pte Ltd and others* [1999] 1 SLR(R) 773 at [43]. [not in the context of an M&A activity]

For derivative actions, the calculation of damages the wrongdoer is liable for is no different from any other civil claims, and would be subject to the principle of remoteness. For actions against directors acting in breach of their fiduciary duties and who have breached the rule against conflict of interest, the shareholders suing on behalf of the company may seek an account of profits from the wrongdoer-director.

The Court may fix the quantum to be paid by the wrongdoer or order the quantum of damages to be assessed. In deciding the quantum of damages to be paid, the court may require parties to adduce expert evidence.

The above relate to litigation brought by shareholders of companies undergoing an M&A transaction. There may also be litigation between the vendor and purchaser arising from an M&A transaction in relation to the contract, such as the purchase of shares. Generally, where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed. See, for example, *Loh Chiang Tien and another v Saman Dharmatilleke* [2020] SGHC 45 at [22]. In a contract for the sale of shares, the measure of damages upon a breach by the purchaser is the difference between the contract price and the market price at the date of the breach, with an obligation on the part of the seller to mitigate the damages by getting the best price he or she can upon that date: see, for example, *City Securities Pte Ltd (in liquidation) v Associated Management Services Pte Ltd* [1996] 1 SLR(R) 410 at [18].

Settlements

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

There are generally no special issues with respect to settling shareholder M&A litigation. However, if the M&A litigation was commenced in the form of a statutory derivative action, the action cannot be settled without the approval of the Court pursuant to section 216B(2) of the Companies Act.

THIRD PARTIES

Third parties preventing transactions

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

Third parties with a legitimate cause of action against one of the parties to an M&A transaction can commence litigation against the parties.

Third parties supporting transactions

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

To the extent that a company was contractually bound to enter into an M&A transaction with a third party, that third party may commence proceedings to sue for specific performance of the M&A. However, specific performance is a special and extraordinary remedy that should only be granted discretionarily where it is just and equitable to do so. The court will consider whether damages is an adequate remedy, and whether the person against whom specific performance is sought would suffer substantial hardship. See, for example, *Lee Chee Wei v Tan Hor Peow Victor and others and another appeal* [2007] 3 SLR(R) 537 at [53].

UNSOLICITED OR UNWANTED PROPOSALS

Directors' duties

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 owe duties to the company to:

- act honestly and use reasonable diligence in the discharge of directors' duties;
- act in good faith in the best interests of the company;
- avoid any conflict of interest; and
- employ powers and act for a proper purpose and not for any collateral purpose.

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Upon receipt of an unsolicited or unwanted proposal to enter into an M&A transaction, the directors have to evaluate the proposal and decide the course of action that would be in the best interests of the company.

A company has certain obligations under the Listing Manual:

1 Under Rule 703 of the Listing Manual, a listed company must announce any information known to it which would be likely to materially affect the price or value of its securities.
2 Under Rule 1102 of the Listing Manual, where a company receives a notice from an offeror of its intention to make a takeover offer, it must request suspension of trading in its listed securities and make an immediate announcement.

The Singapore Code on Take-Overs and Mergers (the Takeover Code) also sets out the following guidelines:

1 Under paragraph 5 of the Takeover Code, the board of the offeree must also not take any action that could frustrate the offer without the approval of shareholders at a general meeting.
2 Under paragraph 7 of the Takeover Code, the board of the offeree must also obtain competent independent advice on any offer and the substance of such advice must also be made known to its shareholders.
3 Under paragraph 8.1 of the Takeover Code, shareholders must be given all the facts necessary to make an informed judgment on the merits and demerits of an offer.
4 Under paragraph 9.1 of the Takeover Code, information about companies involved in an offer must be made equally available to all shareholders as nearly as possible at the same time and in the same manner.

COUNTERPARTIES' CLAIMS

Common types of claim

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

Such claims might be for a breach of the contractual terms of the M&A transaction or for misrepresentation.

Differences from litigation brought by shareholders

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

Claims brought by shareholders tend to be brought before the M&A transaction is completed, with a bid to stop the M&A transaction from going through.

Litigation between the parties to an M&A transaction usually occur after it has been completed. They arise after one party had allegedly breached the terms of the M&A transaction or had made representation to the other party in the lead-up to the M&A transaction, or both.

UPDATES AND TRENDS

Recent developments

36 | What are the most current trends and developments in M&A litigation in your jurisdiction?

There have been no recent reported decisions on M&A litigation in Singapore. This is likely due to the covid-19 pandemic, which has affected economic activity in Singapore.

* *The information in this chapter is accurate as at April 2021*

South Korea

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TYPES OF SHAREHOLDERS' CLAIMS

Main claims

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

The claims that shareholders assert against corporations, officers and directors in connection with M&A transactions are typically with respect to breaches of fiduciary duty by directors, and these claims may be divided into those brought before and after the closing of the M&A transaction. The fiduciary duties that directors of a company owe to the company include the duties of care, disclosure, confidentiality and loyalty.

A pre-closing claim would typically involve an exercise by shareholders of a statutory right to request the M&A transaction to be enjoined pursuant to article 402 of the Korean Commercial Code and may be derivatively brought by shareholders on behalf of the company in connection with a violation of the law or the constitutional documents by a director, which constitutes a breach of fiduciary duty. Shareholders may initially file for a preliminary injunction of the M&A transaction and then seek a permanent injunction in subsequent legal proceedings on the merits of the case.

Post-closing claims may be brought by shareholders on behalf of the company in a derivative suit for breaches of fiduciary duty. South Korea only recognises fiduciary duties arising from a delegation of authority from the company to its directors, so these claims are limited to those alleging the liability of directors with respect to the company. The duty of controlling shareholders in this regard is not recognised.

Shareholders may also bring direct claims against directors under the Korean Commercial Code, which requires directors to compensate third parties that have suffered harm as a result of an intentional or reckless disregard of their duties (eg, owing to an approval of unfair exchange ratios in a merger transaction).

Claims seeking to nullify mergers or spin-offs may also be brought by shareholders alleging violations of statutory requirements for merger contracts, failures to adhere to debtor protection requirements and defects in the shareholder approval process for the merger.

Requirements for successful claims

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

In a pre-closing claim for injunctive relief, shareholders must show a violation of the law or the company's constitution documents and that irreparable harm may be suffered by the company as a result of the M&A transaction.

In a post-closing claim for a breach of fiduciary duty, shareholders must establish that a fiduciary duty existed, was breached and that the breach resulted in the company suffering harm.

In a direct claim as third parties, shareholders must show that a fiduciary duty existed, the directors intentionally or recklessly breached this fiduciary duty and that the breach resulted in the shareholders incurring losses. For example, in a merger between affiliates of a large business group, if the directors approved the merger without appropriately reviewing its terms and conditions and the merger ratios were below fair market value, the shareholders would need to show the intentional or reckless disregard of the directors' duty of care with respect to their approval of the merger and that this breach of duty resulted in a reduction of the value of the shareholders' interest.

Publicly traded or privately held corporations

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, the types of claims generally do not differ depending on whether the company is listed.

Form of transaction

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

To a certain extent, yes. The claims based on breaches of fiduciary duty are generally available to shareholders in connection with all types of M&A transactions, but other claims may be brought for certain types of transactions.

For mergers and spin-offs, shareholders may bring claims seeking to nullify these transactions alleging violations of statutory requirements for merger contracts (eg, failure to stipulate the details of the capital stock in accordance with article 523 of the Korean Commercial Code), failures to adhere to creditor protection requirements and defects in the shareholder approval process for the merger.

For tender offers, shareholders may sue for damages for false or misleading information contained in the disclosure documents, which resulted in harm.

For share purchases, claims are generally brought by shareholders that are party to the transaction alleging a breach of the representation and warranties or tort liability against the sellers.

Negotiated or hostile transaction

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

No. Hostile M&A transactions rarely occur in South Korea.

Party suffering loss

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

Yes. Where the company has suffered losses, shareholders may bring a derivative suit (in accordance with certain procedures) against the company's directors when the directors intentionally or negligently violated any statute, the articles of incorporation or breached a fiduciary duty, and this violation or breach resulted in these losses.

Where shareholders have suffered direct losses in connection with an M&A transaction, they may seek a direct claim for damages against the company or its management, or both, based on South Korean tort law.

COLLECTIVE AND DERIVATION LITIGATION

Class or collective actions

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 or collective actions are not generally permitted under South Korean law except for shareholders seeking indemnification for losses suffered in connection with trading or other transactions involving listed securities under the Securities-Related Class Action Act. In these actions, the court will grant permission for the securities-related class action and a class representative to represent the interests of the class of shareholders (eg, the person who is likely to obtain the largest economic benefit from the class action), who meets the requirements under article 11 of the Securities-Related Class Action Act. This class action is limited to losses resulting from trading or other transactions with respect to the securities issued by the Korea Stock Exchange or KOSDAQ-listed companies, and typically deals with losses suffered by minority shareholders from wrongful acts in the securities markets, such as accounting fraud, failed audit, false disclosure, stock price manipulation and insider trading.

However, in September 2020, the South Korean Ministry of Justice announced a proposed bill to establish a generally applicable class action system.

Some of the main features of the bill include:

- class actions will be possible for any type of civil litigation, with 50 plaintiffs being required for the court to grant class certification;
- the legislation will be retroactive (ie, for any act that occurred prior to the effective date of the legislation) and will provide an opt-out mechanism;
- a pretrial discovery procedure (eg, litigation holds to preserve evidence) will be established, along with stronger penalties for breaching document production orders;
- challenging the court's class certification will not be permitted; and
- the class action will be tried before a jury, unless the plaintiff representative objects or the court intervenes.

The proposed legislation has not been enacted since its 2020 announcement, but was included in the Ministry of Government Legislation's official agenda issued in January 2022. However, it remains to be seen whether the new government, which was elected in March 2022, will proceed in accordance with this agenda.

Derivative litigation

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. Under the Korean Commercial Code, shareholders may bring derivative litigation on behalf of or in the name of the corporation.

With the partial amendment to the Korean Commercial Code in 2020, the scope of shareholders entitled to bring derivative litigation for a publicly held company has been expanded to shareholders owning at least 1 per cent of the company's shares, in addition to those that have owned 0.01 per cent of the company's shares for longer than six months. The threshold for shareholders entitled to bring derivative litigation in a privately held company remains at 1 per cent.

In addition, shareholders that own 1 per cent or more, in the case of a private company, and 0.5 per cent or more, in the case of a public company, of a company that owns more than 50 per cent of a subsidiary's shares may now bring derivative litigation against the subsidiary's directors.

Shareholders must initially file a demand to the company to bring suit and if the company does not respond or if the shareholders are able to demonstrate that the company may suffer irreparable harm within 30 days of the demand, the shareholders may promptly file a suit against the alleged wrongdoers on behalf of the company.

INTERIM RELIEF AND EARLY DISMISSAL

Injunctive or other interim relief

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?

South Korean courts may issue an injunction to prevent the closing of a merger or spin-off (which happens upon registration) and the shareholders, directors, auditor, receiver, trustee in bankruptcy or debtor of either company that is a party to the merger or spin-off may file for the injunction under article 529 or 530-11 of the Korean Commercial Code, respectively. These plaintiffs may file for a preliminary injunction in advance of a trial on the merits, and must demonstrate that they have a legal interest in the merger or spin-off and the necessity of preservation, that they would suffer substantial harm or an imminent threat of substantial harm if the merger or spin-off were to close and that post-transactions proceedings would be unduly burdensome to pursue.

Although the court only rarely modifies deal terms, where the objective meaning of the text of a disposition document is unclear, it has discretion to favour an interpretation of the text that would not materially affect the legal relationship between the parties.

Early dismissal of shareholder complaint

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

As there is no comprehensive discovery under South Korean law, this is not applicable to South Korean litigation. There is no separate process for early or summary dismissal of a shareholder complaint.

ADVISERS AND COUNTERPARTIES

Claims against third-party advisers

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

Yes, shareholders may bring claims against third-party advisers involved in M&A transactions for the advisers' liability based in tort or contract, but these claims are very rare.

Claims against counterparties

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

Yes, in theory. Based on joint tort liability under the Civil Act, shareholders may bring claims against the counterparties to M&A transactions for aiding and abetting the breach of fiduciary duty by the directors of the shareholders' company, but can only succeed on these claims if causation between the counterparties' conduct and the breach is recognised by the court.

In addition, if a party's directors are indicted for a breach of fiduciary duty under the Criminal Act (eg, for occupational breach of trust), the counterparty may also be joined as a co-defendant. However, this would be rare in practice.

LIMITATIONS ON CLAIMS

Limitations of liability in corporation's constitution documents

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 the Korean Commercial Code, a company may in its constituting documents limit the monetary liability of a director for a negligent breach of the director's obligations to six times the most recent annual compensation provided to this director (three for outside directors) prior to the date of the alleged breach. However, notwithstanding this general rule, if the breach was intentional or reckless and caused the company to suffer losses, or was in violation of the director's non-compete duty, the prohibition against the usurpation of the company's opportunities and assets or the prohibition against self-dealing, these limitations of liability do not apply. Further, the Supreme Court has held that South Korean courts may exercise reasonable discretion to limit the scope of these limitations of liability in consideration of the circumstances surrounding a breach of fiduciary duty, including the substance of and underlying motives for the breach.

Statutory or regulatory limitations on claims

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 particular statutory or regulatory provisions that clearly limit shareholders' ability to bring claims against directors and officers in connection with M&A transactions.

However, under the Korean Commercial Code, shareholders may only bring derivative suits against directors and officers if they satisfy certain holding requirements and the company has not filed a lawsuit or irreparable harm is deemed likely to occur within 30 days of the shareholders' demand.

Common law limitations on claims

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

South Korea is a civil law jurisdiction and therefore South Korean courts do not apply common law rules. However, South Korean courts generally do apply the business judgment rule. This rule relieves an executive or director of legal responsibility for a business decision if the decision was:

- made within their authority;
- based on reasonable grounds; and
- made for what they, in good faith, believed to be in the best interests of the company, provided that there was no fraud, unlawfulness or conflict of interest, even when the decision resulted in the company suffering harm.

As such, the South Korean courts generally respect the management's business decisions and this would limit shareholders' ability to bring successful claims against board members or executives. However, in South Korea, the fiduciary duty that directors bear is to a company and not to shareholders, thus the rule may not be applicable in direct claims asserted by shareholders that do not allege a breach of fiduciary duty.

STANDARD OF LIABILITY

General standard

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 board member or executive may be held liable to shareholders in connection with an M&A transaction if he or she breached the fiduciary duties he or she was required to abide by. More specifically, a director must act in the best interests of the company. For example, if a director approves a merger with an affiliated company for the benefit of the ultimate controlling shareholder that is harmful to the company, then he or she may be found to be in breach of his or her fiduciary duty.

The business judgment rule will apply but only in respect of the director's duty owed to the company.

Type of transaction

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

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

Type of consideration

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

No, we are not aware of cases where different standards have been applied depending on the type of consideration.

Potential conflicts of interest

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

Under the Korean Commercial Code, if a director or a controlling shareholder intends for the company to engage in a transaction in which he or she is interested, he or she must disclose any material facts in advance regarding this transaction to the board of directors and must obtain approval by two-thirds or more of the total number of directors, and the relevant transaction must be fair and at arm's length in terms of its particulars and procedures.

It is the prevailing view that the above provision applies to M&A transactions. Accordingly, when a director knowingly engages in an M&A transaction in violation of this provision, the court will not apply the business judgment rule or any limitation of liability provided for in the constitution documents.

Controlling shareholders

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 rateably with all shareholders?

Under the Korean Commercial Code, if a director or a controlling shareholder intends for the company to engage in a transaction in which he or she is interested, he or she must disclose any material facts in advance regarding this transaction to the board of directors and must obtain approval by two-thirds or more of the total number of directors, and the relevant transaction must be fair and at arm's length in terms of its particulars and procedures.

INDEMNITIES

Legal restrictions on indemnities

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?

Although the Supreme Court has held the view that the indemnification of legal fees for a company's officers and directors that are named as defendants in connection with the performance of their duties may be acknowledged as an administrative cost, this has not yet been codified. However, the indemnification of legal costs for matters not related to the performance of company duties has been found invalid.

M&A CLAUSES AND TERMS

Challenges to particular terms

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

In general, shareholders are not entitled to challenge particular clauses or terms in M&A transaction documents unless they are a party to the M&A transaction. Instead, shareholders can bring a claim against directors for their breach of fiduciary duty if these clauses or terms are in violation of directors' fiduciary duty owed to the company. In particular, the issuance of new shares at low value or acquiring another company's shares at high value have resulted in these challenges from minority shareholders. However, to date, the 'no shop' or 'no talk' provision has rarely been challenged on the grounds of a director's breach of fiduciary duty.

PRE-LITIGATION TOOLS AND PROCEDURE IN M&A LITIGATION

Shareholder vote

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

A shareholder vote generally does not have an effect on M&A litigation.

Insurance

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

Directors' and officers' insurance can cover claims asserted in connection with shareholder litigation arising from M&A transactions. Demand for this type of insurance in South Korea has significantly increased in recent years with the increase in shareholder litigation.

Burden of proof

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 basic rule for burden of proof under South Korean law is that each party bears the burden of proving the facts it seeks to rely on. As a result, the plaintiff must prove the underlying facts that constitute its claim, and the defendant must prove the facts necessary for its defence. This distribution of burden of proof is consistently applied, unless the applicable burden is switched or alleviated by an act of law or established jurisprudence. Generally, switching or alleviating the burden of proof is applied in limited circumstances under South Korean law and has not often come up in the context of M&A disputes. Accordingly, in an M&A litigation filed by a shareholder on behalf of the company claiming a breach of the director's fiduciary duty, the shareholder must prove the breach and the damage suffered.

Pre-litigation tools

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

Under the Korean Commercial Code, any shareholder may request that the company provide access or copies of constitutional documents and minutes of the general meetings of shareholders at any time during business hours. Shareholders may also inspect the financial statements of the company at any time during business hours.

In addition, a shareholder may also request to inspect or copy the minutes of the board of directors' meeting and books of accounts and related documents. However, the board of directors may reject a request with an explanation. In the case of a rejection, a shareholder may obtain these documents via a court order.

Similarly, a shareholder who holds a certain percentage of the total number of issued and outstanding shares (more than 3 per cent for private companies and 0.1 per cent for six months for most listed companies) is entitled to request the inspection or copying of the books of accounts and related documents. A company may not reject a request made by a shareholder unless it can demonstrate that this request is improper.

Forum

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

In most cases, when a company is involved in a dispute as a defendant, the district court governing the location of the principal office of the company has exclusive jurisdiction. In addition, in cases where a director is a defendant, the general forum of the director shall be determined by the director's domicile.

Expedited proceedings and discovery

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

South Korea does not have expedited proceedings or extended discovery; instead, there is an obligation under the Civil Code to submit documents, and if a party submits a request specifying the person who possesses a document, the alleged fact and the obligation to submit the document to the court, the court will make a determination on the request. If a party does not comply with an order to produce the requested document, the court may deem the relevant alleged fact to be true.

DAMAGES AND SETTLEMENTS

Damages

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

Damages with respect to M&A litigation are calculated pursuant to the Civil Code and generally by restoring the company or shareholder to the position they would have been in had the alleged misconduct not occurred. Consequential or special damages are generally not recognised, unless they were reasonably foreseeable.

Punitive damages were generally not applicable under South Korean law except where specifically provided for, such as in the Subcontracting Act. While the Ministry of Justice announced a proposed amendment to the Korean Commercial Code permitting punitive damages up to five times the actual loss incurred, it remains to be seen whether this will become law in light of the recent change in the administration mentioned earlier.

Settlements

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

Although not common practice, a South Korean court may request that parties consider in-court settlement by way of court-supervised mediation. In this case, the parties are not legally bound to accept the court's recommendation and can proceed with the trial.

THIRD PARTIES

Third parties preventing transactions

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

Under the Korean Commercial Code, the shareholders, directors, auditor, receiver, trustee in bankruptcy or debtor of either company that are party to the merger or spin-off may file for an injunction under article 529 or 530-11 of the Korean Commercial Code, respectively. These plaintiffs may file for a preliminary injunction in advance of a trial on the merits and must demonstrate that they have a legal interest in the merger or spin-off, that they would suffer substantial harm or an imminent threat of substantial harm if the merger or spin-off were to close and that post-transaction proceedings would be unduly burdensome to pursue.

For other interested financial or strategic buyers to break up or stop an M&A transaction, unless the M&A transaction breaches competition rules, they would need to claim a contractual breach of a separate agreement (eg, a letter of intent or memorandum of understanding). A labour union can also challenge an agreed M&A transaction, depending on the terms of the collective bargaining agreement.

Third parties supporting transactions

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

It is highly unlikely that a third party could force an M&A transaction through litigation. Specific actions to compel an M&A transaction are generally not recognised, although a company may ultimately decide to pursue certain M&A transactions with the third party to avoid damage liability.

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UNSOLICITED OR UNWANTED PROPOSALS

Directors' duties

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 same principles of fiduciary duties apply for unsolicited or unwanted proposals to enter into an M&A transaction as would generally apply to directors in performing their corporate duties under the Korean Commercial Code. The Korean Commercial Code requires directors to exercise all due care required of a good faith administrator and to adhere to all applicable laws and the company's constitution in the performance of their duties. In the case of an unsolicited or unwanted proposal to enter into an M&A transaction, directors are required to make reasonable decisions taking into consideration the best interests of the company in accordance with their duties of care and loyalty, and to adopt defensive tactics only if doing so would be in the interests of the company.

COUNTERPARTIES' CLAIMS

Common types of claim

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

The most frequent claims asserted by and against counterparties in an M&A transaction are claims raised by purchasers post-closing asserting misrepresentation and breach of representation and warranties (R&W).

Although sandbagging has been recognised by the South Korean Supreme Court, in R&W breach claims, depending on the factual circumstances and the fairness of the risk allocation reflected in the M&A contract, the court may reduce the damages amount.

A post-closing price adjustment mechanism through the use of a closing escrow account is relatively common in South Korea for M&A transactions involving strategic sellers and buyers, and purchase price adjustment or earn-out claims are also common, although many of these claims are increasingly arbitrated.

Differences from litigation brought by shareholders

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 typically seek damages based on the contractual relationship between the parties, whereas claims brought by shareholders seek damages or court appraisals based on alleged breaches of fiduciary duty.

UPDATES AND TRENDS

Recent developments

36 | What are the most current trends and developments in M&A litigation in your jurisdiction?

Current trends show that the following are increasing:

- M&A litigation filed by minority shareholders to challenge certain deal terms such as merger ratio or seeking to injunct sale by controlling shareholder on the basis of breach of fiduciary duty;
- M&A shareholder disputes involving the exercise of put options or drag-along rights, including pricing issues and the validity of these options, as well as injunctions against the exercise of shareholders' rights in connection with the foregoing; and
- M&A litigation seeking to either terminate an agreed M&A transaction (based on material adverse change out or *force majeure*) or rescind an M&A transaction post-closing on the grounds of knowingly providing false representations and warranties.

Sweden

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TYPES OF SHAREHOLDERS' CLAIMS

Main claims

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

Pursuant to Chapter 29, section 1 of the Swedish Companies Act, a founder, a member of a board of directors or a managing director who, in the performance of their duties, intentionally or negligently causes damage to the company shall compensate such damage. The same applies where damage is caused to a shareholder or other person as a consequence of a violation of the Swedish Companies Act, the applicable annual reports legislation, or the articles of association. As laid down in case law, the assessment of whether or not a negligent violation of those rules may lead to liability in damages against a shareholder or other must take into account what purpose the violated rule seeks to protect (see NJA 2014 p272).

Accordingly, the fiduciary duties are owed to the company and thus not to any individual shareholder. Shareholders may bring claims against founders, board members and the managing director if there has been a violation of the Swedish Companies Act, the annual accounts act or the articles of association. Also, a shareholder may bring a claim against a founder, board members and the managing director if the company has set up a prospectus in accordance with Regulation (EU) No. 2017/1129 (the Prospectus Regulation), a document that is referred to in article 1.4(g) or article 1.5 in that regulation or a document under the Swedish Law of Trade with Financial Instruments. In such a situation, the shareholder must show that damage has occurred as a result of a violation of the said provisions.

Consequently, there are higher hurdles to overcome for a shareholder (compared to the company itself) to be successful with a claim against directors.

The main claims brought by shareholders against board members or the managing director are based on alleged violations of the Swedish Companies Act. In connection with M&A transactions, the most common legal basis for such claims is presumably alleged violations of the general provision in Chapter 8, section 41 of the Swedish Companies Act. This provision, states that the board of directors or any other representative of the company may not perform legal acts or any other measures that are likely to provide an undue advantage to a shareholder or another person to the disadvantage of the company or any other shareholder. Nor may a representative of the company comply with instructions from the general meeting or any other company organ where such instruction is void as being in violation of the Swedish Companies Act, the applicable annual reports legislation or the articles of association. Such alleged violations are common when a shareholder, for example, finds its shareholding diluted or that the shares of the company were allegedly divested at price below fair value.

Further, there are specific remedies available to individual shareholders. For example, shareholders representing at least 10 per cent of the shares in the company may bring a derivative claim against board members in their own name on behalf of the company. Claims on behalf of the company against the board members are often based on the general duties of the board members with respect to the administration of the company, the management of the company's affairs and the overall duty of loyalty towards the company and to the company's shareholders as a collective.

Requirements for successful claims

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

In general, the claimant must show that a damage has occurred, that the director caused the damage in the performance of their duties towards the company and that the director has been negligent. Further, proximate cause must be established with respect to the negligence and the damage.

If the damage claim is brought by shareholders (as opposed to the company itself), it must also be shown that the director has breached the Swedish Companies Act, the articles of association or the applicable annual reports legislation. In the alternative, if the company is publicly traded, the shareholder may under certain circumstances bring a claim if damage has occurred as a result of a violation of the Prospectus Regulation, a document that is referred to in article 1.4(g) or article 1.5 in that regulation or a document under the Swedish Law of Trade with Financial Instruments. The assessment of liability for the board of directors towards the company is thus broader in scope.

If the claim is based on the general provision in Chapter 8, section 41 of the Swedish Companies Act, the claiming shareholders bear the burden of proof for establishing that the board of directors or any other representative of the company has performed a legal act or any other measure that is likely to provide an undue advantage to a shareholder or another person to the disadvantage of the company or any other shareholder. The evidence is assessed on a case-by-case basis.

Publicly traded or privately held corporations

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 principle, the types of claims do not vary depending on whether the corporations involved in the M&A transaction are publicly traded or privately held. However, there are statutory provisions that only apply to listed stock companies. For example, shareholders can only bring a claim based on a violation of the Prospectus Regulation if the company is publicly traded. It can be noted that according to the Swedish Act on

Public Takeover Bids on the Stock Market, the possibilities for the board of directors to undertake 'defence' strategies in the event of a hostile takeover are restricted. However, it is not clear whether violations of the Swedish Act on Public Takeover Bids on the Stock Market can be a basis for a claim under the Swedish Companies Act.

Form of transaction

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

In general, the form of transaction does not affect the type of claim that can be brought based on the Swedish Companies Act. Share purchase claims are normally based on a contract.

Negotiated or hostile transaction

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

No. The board of directors owes the same fiduciary duties to the company regardless of whether the transaction involves a negotiated transaction or a hostile or unsolicited offer. According to the Swedish Act on Public Takeover Bids on the Stock Market, the possibilities for the board of directors to undertake 'defence' strategies in the event of a hostile takeover are restricted. However, it is not clear whether violations of the Swedish Act on Public Takeover Bids on the Stock Market can be a basis for a claim under the Swedish Companies Act.

Party suffering loss

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

Yes. First, shareholders can only assert claims if they themselves have suffered a loss. If the corporation has suffered a loss, shareholders usually cannot assert any claims. In practice, however, it is common that shareholders pursue claims for damages on the basis that their shares have decreased in value as a result of the corporation suffering a loss.

Second, in general, only shareholders who have suffered a loss are considered to have standing. However, in certain circumstances, shareholders may bring claims on behalf of the company. Third, it is somewhat unclear under Swedish law whether a shareholder can be successful with a claim based on the fact that he or she has suffered indirect damages, namely where the shareholder has suffered damage since the value of his or her shares has decreased. Fourth, if the damage claim is brought by shareholders (as opposed to the company itself), it must be shown that the director has breached the Swedish Companies Act or the articles of association or, in the alternative, the relevant provisions regarding prospectus in, inter alia, the Prospectus Regulation. The assessment of liability for the board of directors towards the company is thus broader in its scope.

COLLECTIVE AND DERIVATION LITIGATION

Class or collective actions

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, Swedish law provides for class actions by the Class Action Act, although class actions are not common in practice. For a group action to be brought:

- the claim must be based on factual circumstances that are common or similar among the shareholders;
- a group action must not be regarded as inappropriate due to the reason that some of the group members' claims differ from the other shareholders' claims;
- the majority of the claims being brought forward by the group action must not be brought by an individual shareholder alone;
- the group represented by the named plaintiff must with regard to its size, delimitation and other relevant aspects be appropriate delimited and concise; and
- the named plaintiff must with regard to their interest in the claim, economic conditions for conducting a class action and other relevant aspects be appropriate to represent the other members in the case.

Derivative litigation

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 Swedish Companies Act provides that shareholders whose shares represent at least 10 per cent of the shares in the company may bring proceedings in their own names for directors' and officers' liability on behalf of the corporation. In such a case, the ordinary rules of procedure apply.

INTERIM RELIEF AND EARLY DISMISSAL

Injunctive or other interim relief

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?

According to the Swedish Code of Judicial Procedure, injunctive or other interim relief can be awarded if a shareholder can prove that he or she has a certain right or claim that can be assumed to be subject to litigation and that it can be assumed that the counterparty by choosing to undertake or not to undertake a certain measure will complicate for the claimant to enjoy his or her right or claim. In such a case, the court may decide for appropriate measures. For example, a court can under certain circumstances render an interim order prohibiting the execution of the M&A transaction in question.

Swedish courts cannot generally enjoin M&A transactions or modify deal terms. However, a party can bring action and claim performance of the contract, including, for example, transfer of the shares.

Early dismissal of shareholder complaint

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

There is no legal remedy that enables defendants to seek early dismissal of a shareholder complaint. An action may be dismissed for general procedural reasons such as lack of jurisdiction. It could also be noted that a claimant who is domiciled outside the European Economic Area may be required to provide security for the litigation costs of the other party.

ADVISERS AND COUNTERPARTIES

Claims against third-party advisers

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

As a main rule, only the corporation itself can assert claims against advisers on the basis of its contractual relationship. However,

shareholders may assert claims if the contract can be deemed to have a protective effect to the benefit of third parties. This may, for example, be stated explicitly in the contract. Depending on the circumstances, shareholders may sometimes also be deemed to have had a legitimate belief to rely on certain information provided by a third party, namely, even in the absence of contractual regulations to that effect. In that regard, it follows from case law that the assessment is divided into two parts. First, the court must assess whether the third party (ie, the shareholder) has relied on the information and thus acted in a certain way as a result of the information. Second, the court must assess if it was legitimate for the third party to rely on the information.

Claims against counterparties

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

Shareholders in one of the parties can bring claims against counterparties in an M&A transaction provided that such shareholders have rights protected in the relevant agreement. In addition, minority shareholders sometimes attempt to bring claims based on tort and general principles of law, but the possibilities are limited.

LIMITATIONS ON CLAIMS

Limitations of liability in corporation's constitution documents

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 is not possible to preclude the future liability of board members and executives by including a provision in the constituent documents of the company. However, if a board member is liable for damages caused to the company, an agreement can be made between the company and the board member to reduce or extinguish the liability. Such an agreement may, however, only be entered into by approval by a shareholders' meeting and provided that the owners of one-tenth of all of the shares in the company do not vote against a proposal for the agreement.

Statutory or regulatory limitations on claims

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?

Normally, board members are discharged from liability at the company's annual general meeting of shareholders. If the board members are discharged from liability, a proceeding cannot be brought against them to recover damages on behalf of the company unless:

- incorrect or incomplete information has been provided to the shareholders' meeting in respect of circumstances relating to the decision or act upon which the proceeding is based; or
- the board member has committed a crime that, for example, has resulted in the company having to pay damages.

However, unless based on criminal acts, proceedings on behalf of the company may not be brought against a board member or managing director if more than five years have elapsed since the end of the financial year in which the resolutions or measures on which the action is based were adopted or taken.

Claims from shareholders or a third party can be made also if the directors have been discharged from liability irrespective of the five-year time limit. Thus, the fact that a director has been discharged from liability does not prevent a shareholder from bringing a claim against the director. Also, the five-year limit does not prevent the shareholder from initiating such a claim. Instead, the general time limit of 10 years apply. However, there are other hurdles for the shareholder to overcome. For example, the shareholder must show that the director has breached the Swedish Companies Act or the articles of association.

Common law limitations on claims

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

Sweden is a civil law jurisdiction and there are no explicit rules that impair shareholders' ability to bring claims against board members or management. A Swedish court does not generally question whether a decision or action within the management of a company was wise and thus attribute a wide margin of discretion to the management and board of directors to make business-related decisions on behalf of the company. Normally, high risk or speculative decisions or actions are not likely to imply liability for the directors or management, if the decision or action falls within the company's ordinary course of business.

STANDARD OF LIABILITY

General standard

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 M&A transactions. Since M&A transactions are business decisions, the normal standard applies. Thus, as a starting point, the claimant must show that a damage has occurred, that the director caused the damage in the performance of his or her duties for the company and that the director has been negligent. It must also be shown that the director has breached the Swedish Companies Act or the articles of association.

Type of transaction

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

No, there are no specific standards.

Type of consideration

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

No, there are no specific standards.

Potential conflicts of interest

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 does not vary. However, the wide margin of discretion to the management and board of directors to make business-related decisions on behalf of the company often depends on, inter alia, the fact that the manager's decision is based exclusively on the interests of the company. Thus, it is more likely that the management and (or) board of directors will be regarded as having acted with negligence in connection with an M&A transaction if there is a conflict of interest.

Controlling shareholders

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 rateably with all shareholders?

The standard does not vary. However, if a board member agrees on terms with the controlling shareholder that are not shared ratably with all shareholders, or if the board member grants benefits only to a controlling shareholder, the board member can usually be held liable. There might also be implications relating to tax (ie, hidden distribution of profits).

INDEMNITIES

Legal restrictions on indemnities

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?

No. Directors and officers are held individually responsible. Directors and officers may be covered by the company's insurance, which also may cover legal, extrajudicial defence costs and legal consultancy costs.

M&A CLAUSES AND TERMS

Challenges to particular terms

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

Shareholders can usually not challenge clauses or terms in M&A transaction documents unless they are a contracting party. However, shareholders can challenge the decision to conclude a contract and thus hold board members liable for concluding the contract. As stated before, a prerequisite is, inter alia, that the director has been negligent.

PRE-LITIGATION TOOLS AND PROCEDURE IN M&A LITIGATION

Shareholder vote

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

Board members are normally discharged from liability at the company's annual general meeting of shareholders. If the board members are discharged from liability, a claim cannot be brought against them to recover damages on behalf of the company unless:

- incorrect or incomplete information has been provided to the shareholders' meeting in respect of circumstances relating to the decision or act upon which the proceeding is based; or
- the board member has committed a crime that, for example, has resulted in the Company having to pay damages.

Thus, a shareholder vote for discharge can alter the possibilities to bring action against an M&A transaction. Last, however, shareholders whose shares represent at least 10 per cent of the shares in the company may stop board members from being discharged from liability.

Insurance

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

One way to protect board members from personal liability for damages caused to third parties is by arranging for a director's liability insurance. It is common for companies to take out such insurance. Depending on the terms of the insurance policy, the insurance may also cover claims brought by shareholders in the context of an M&A transaction.

Burden of proof

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 principle, the claimant bears the burden of proof for its own claims. This includes, inter alia, that the claimant must provide evidence of the damaging act, the damage caused by it and the loss.

There is no reversal of the burden of proof with respect to the liability of a company's management in relation to the injured company. The burden of proof may, however, shift in certain circumstances. For example, if the claimant shows that it is probable that the director has been negligent, the burden of proof may shift to the director to show that he or she has not been negligent. In other words, the director might in such a situation have to exculpate him or herself.

Pre-litigation tools

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

The shareholders exercise their influence at the general meeting and cannot make decisions with respect to the company's business outside of the general meeting. To obtain insight into a company's finances and other information, the shareholders may, for example, be present and ask questions during the general meeting or require that a specific matter is listed on the meeting agenda. The board of directors and the managing director shall if a shareholder so requires, and if it would not severely damage the company, provide information relevant to any matter on the meeting agenda and information relevant to the assessment of the company's financial situation. As regards publicly listed companies, there are additional rights for the shareholders to obtain access to, for example, accounting records and audit reports before the annual meeting. Any right of the shareholders to obtain insight into a company's finances and other information is, however, no longer available if the company has been sold.

Forum

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

There are no specific rules with respect to M&A litigation. Thus, the ordinary rules on territorial competence apply (ie, the rules under the Swedish Code of Judicial Procedure, the recast EU Brussels Regulation and the Lugano Convention). The parties may disregard these rules by agreement. Forum selection clauses are generally admissible in contracts between companies.

Expedited proceedings and discovery

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

With respect to court proceedings, there are no expedited proceedings available in Sweden. Nor is pre-trial discovery, as such, available. Discovery, as understood in the United States, for example, is not possible. However, under the Swedish Code of Judicial Procedure, a party can request that the counterparty produces a written document that can be assumed to be of importance as evidence in a case. The

documents requested must be clearly identified. In addition, documents that are attorney-client privileged or can be said to constitute personal notes are excluded.

DAMAGES AND SETTLEMENTS

Damages

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

There are no specific rules for calculating damages in M&A litigation. The object of damages is to place the party to whom they are awarded in the same pecuniary position as the party would have been in if the breach triggering liability had not occurred. Also, the usual ways in which experts calculate damages are normally used in M&A litigation. Of course, however, certain situations normally tend to arise in connection with M&A transactions that, in turn, can affect how damages are calculated.

If the parties are in dispute as to how much the damage amounts to, the court may in certain specific situations be requested to estimate the damage according to Chapter 35, section 5 of the Swedish Code of Judicial Procedure. For this provision to be applicable, the claimant must have presented sufficient facts for the court to have a basis for an estimate and sufficient evidence regarding the size of the damage cannot be produced. As M&A litigation often give rise to big claims while the factual circumstances are generally hard to get a full grasp on, it is often argued that the court must estimate the damage.

Settlements

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

Generally, there are no special issues.

THIRD PARTIES

Third parties preventing transactions

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. However, the Swedish Code of Judicial Procedure provides the opportunity to bring injunctive relief, provided that the claimant has sufficient grounds for such action.

Third parties supporting transactions

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

No, third parties generally cannot use litigation to force or pressure corporations to enter into M&A transactions.

UNSOLICITED OR UNWANTED PROPOSALS

Directors' duties

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?

If an unsolicited or unwanted proposal is received by the directors, several duties may arise out of the loyalty obligations towards the shareholder. For example, the shareholders must be informed about the offer. Also, the Swedish Act on Public Takeover Bids on the Stock Market entails certain restrictions on the possibilities for the board of directors to undertake 'defence' strategies in the event of a hostile takeover.

Further, there are several statutory provisions in the case of takeover bids regarding listed companies. In practice, the 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.

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COUNTERPARTIES' CLAIMS

Common types of claim

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 in practice arise out of the terms of the purchase agreement. This includes, inter alia:

- breach of contract;
- breach of representations;
- warranty claims;
- purchase price adjustments; and
- earn-out claims.

These claims are typically resolved by arbitration (as most M&A contracts contain arbitration clauses). In addition, buyers may assert claims based on fraud, including claims for fraud in the inducement.

Differences from litigation brought by shareholders

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 contract-based. This means, inter alia, that these disputes are settled by arbitration (as most M&A contracts contain arbitration clauses). Litigation brought by shareholders that are not a party to the contract, or not otherwise protected by contract provisions, in connection to an M&A transaction is generally based on the Swedish Companies Act. Such claims are litigated in general courts.

UPDATES AND TRENDS

Recent developments

36 What are the most current trends and developments in M&A litigation in your jurisdiction?

Warranty claims are increasing, especially in times of volatile markets. Also, claims in regards to option agreements or other subsequent acquisitions post-closing may give rise to disputes. M&A insurance has become increasingly more common.

Switzerland

Harold Frey and Dominique Müller

Lenz & Staehelin

TYPES OF SHAREHOLDERS' CLAIMS

Main claims

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 Swiss corporate law as set forth in the Swiss Code of Obligations.

Requirements for successful claims

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 shareholder to show that the resolutions violate the corporation's articles of association, provisions or principles of Swiss corporate law or provisions of the MA (board resolutions can in principle 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 forfeited.

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 or corporations involved or to the plaintiff shareholder; and that there is an adequate causal nexus between the breach of duty and this 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. The claims prescribe five years (from 1 January 2023, three years) after the date on which the person suffering damage learned of the damage and of the person liable for it, but in any event 10 years after the date on which the harmful conduct took place or ceased.

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. These claims must be filed within two months of the publication of the merger, demerger or conversion resolution, after which the respective claims will be forfeited.

Publicly traded or privately held corporations

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. However, 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.

Form of transaction

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.

Negotiated or hostile transaction

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.

Party suffering loss

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.

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 these claims.

COLLECTIVE AND DERIVATION LITIGATION

Class or collective actions

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. Further, 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.

In December 2021, the Swiss government submitted a proposal to introduce a collective action for the collective enforcement of mass and scatter damages to Parliament. However, such collective action would be subject to strict conditions and it is unclear if and when such provisions will be enacted. In any case, common-law types of class actions would still not be possible under the proposed provisions.

Derivative litigation

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. This 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 the payment of damages on account of the corporation (not the plaintiff shareholder) to compensate for the loss suffered by the corporation.

INTERIM RELIEF AND EARLY DISMISSAL

Injunctive or other interim relief

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 this violation will cause the plaintiff irreparable harm. In these proceedings, the court further assesses whether the relief requested by the plaintiff is reasonable and the harm caused to the defendant if this relief was granted is proportionate (balance of the equities). On this basis, a Swiss court may prevent the closing of 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 this relief ex parte, subject to confirmation in inter partes proceedings. Any interim or injunctive relief granted by a court must be pursued by the plaintiff in ordinary proceedings to have a court confirm the right of the plaintiff and the violation thereof.

From 1 January 2021, the possibility to file a simple objection with the commercial register and block entries into the commercial register was abolished. A party interested in preventing the closing of transactions that require an entry in the commercial register must now apply to a court for an interim injunction to block such entry. For such injunctions proceedings, the aforementioned principles apply, ie the blocking of the commercial register is ordered by the court if the interested party makes a prima facie showing that a right of the plaintiff has been violated or is about to be violated and that this violation will cause the plaintiff irreparable harm.

Under the Swiss Merger Act, 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, this 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.

Early dismissal of shareholder complaint

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.

ADVISERS AND COUNTERPARTIES

Claims against third-party advisers

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 these third-party advisers; that is, typically the corporations that are assisted by the advisers. However, to the extent that third-party advisers are involved in the review of a merger, demerger or conversion of legal form as specifically required under the Swiss Merger Act (MA), they may become liable both to the involved corporations 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.

Claims against counterparties

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, breach 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 the officer or director, such counterparty could be held liable by the corporation's shareholders as a de facto officer or director.

LIMITATIONS ON CLAIMS

Limitations of liability in corporation's constitution documents

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. For instance, the articles of association may authorise the board of directors to delegate the management of all or part of the company's business to individual members or third parties in accordance with organisational regulations. Such delegation has the effect of limiting the liability of the non-executive members of the board of directors. 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.

Statutory or regulatory limitations on claims

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 that consented to the release resolution, to the extent that the liability action is based on facts that were known to the shareholders when adopting the release resolution. This release resolution further limits the non-consenting shareholders' ability to bring liability claims, as the right to bring an action of these shareholders is forfeited six months (from 1 January 2023, 12 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, this shareholder resolution is generally deemed to have the same effect with respect to the 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 this transaction, provided the facts on which these liability claims are based were properly disclosed and, thus, known (or at least easily recognisable) to the shareholders when adopting the resolution.

Common law limitations on claims

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. However, 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 the business decision was reasonable and must not review whether the decision was correct in substance. However, as the Swiss Federal Supreme Court emphasised, this concept of judicial restraint applies in principle only to business decisions but not to decisions taken by the board of directors in the exercise of its statutory duties.

STANDARD OF LIABILITY

General standard

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 Swiss Merger Act 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 this 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.

Type of transaction

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 the particular situation.

Type of consideration

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.

Potential conflicts of interest

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 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 of itself, this is not necessarily the case and does not trigger liability automatically. However, according to precedent by the Swiss Federal Supreme Court, where a conflict of interest is established, there is a factual presumption that the board member or executive acted in breach of his or her duties by taking a business decision under the influence of this conflict. This presumption may be rebutted by showing that the corporation's interests were safeguarded despite the conflict of interest.

Controlling shareholders

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 rateably 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 this situation. 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.

INDEMNITIES

Legal restrictions on indemnities

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' insurance for the benefit of its directors and officers.

M&A CLAUSES AND TERMS

Challenges to particular terms

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) is limited, and the competent authorities under Swiss stock exchange law review whether a tender offer respects these limits. A shareholder who wishes to challenge this clause may thus apply to these authorities and argue that the 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, that approve a merger, demerger or conversion of legal form, but not individual clauses in M&A transaction documents.

PRE-LITIGATION TOOLS AND PROCEDURE IN M&A LITIGATION

Shareholder vote

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. 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 this transaction, and provides the board members and officers with a legal defence against liability claims. 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.

Insurance

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 directors' and officers' insurance, this insurance plays an important role in liability actions brought by shareholders against directors or officers (including those arising from M&A transactions).

Burden of proof

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 breached a legal duty under Swiss corporate law or the Swiss Merger Act (MA); that this breach caused loss or damage to the

corporations involved or to the plaintiff shareholder; and that there is an adequate causal nexus between the breach of duty and this loss or damage. It depends on the specific claim, and it is controversial whether the plaintiff shareholder must also establish the fault of the defendant or whether fault is presumed (in which case 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, or the corporation's articles of association.

Pre-litigation tools

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. From 1 January 2023, shareholders of non-listed companies who together represent at least 10 per cent of the share capital or the voting rights, may also ask the board in writing to provide such information in the time between shareholders' meetings. The board is obliged to provide this information (from 1 January 2021, within four months), to the extent the information required for the proper exercise of shareholders' rights but may refuse to provide information when doing so would jeopardise the corporation's business secrets or other interests worth protecting.

In the case of a refusal to provide the requested information, from 1 January 2023, the board must provide a written reasoning. The requesting shareholder may apply to a court, which may order the corporation to provide the requested information.

Under the current regulation (which remains in force until the end of 2022, 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.

From 1 January 2023, shareholders may inspect the company's account and files if together they represent at least 5 per cent of the share capital or voting rights. Such inspection must be granted by the board insofar as it is necessary for the exercise of shareholders' rights and insofar as no business secrets or other interests of the company that are worthy of protection are jeopardised. Such inspection must be granted within four months. If the board refuses to provide the requested information or inspection, the board must state the reasons for such refusal in writing and the shareholders may apply to a court, which may order the company to provide the requested information or inspection.

Moreover, any shareholder may request that the general shareholders' meeting has specific company matters investigated by means of a special audit when this is necessary to properly exercise the shareholders' rights. The main purpose of this 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 these 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.

If the general meeting does not approve the special audit, under the current rules (which remain in force until the end of 2022) 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.

From 1 January 2023, shareholders of listed companies who together represent at least 5 per cent of the share capital or voting rights or shareholders of unlisted companies who together represent at least 10 per cent of the share capital or voting rights may request the court within three months to order an independent special audit.

Such shareholders 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 or the shareholders.

Forum

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.

Under Swiss law, it is also possible to include an arbitration clause in the articles of association of a corporation. However, the admissibility and scope of such clauses have been subject to controversy and such clauses were of limited practical importance. From 1 January 2023, however, the possibility of including an arbitration clause in the articles of association will be explicitly stipulated in Swiss corporate law. It may provide that corporate law disputes, including challenge actions against shareholder resolutions and liability claims against directors and officers, are subject to the jurisdiction of an arbitral tribunal sitting in Switzerland. It remains to be seen whether these developments will increase the practical relevance of arbitration for challenge actions against shareholder resolution or liability actions.

Expedited proceedings and discovery

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

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. 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 International Chamber of Commerce or the Swiss Chambers' Arbitration Institution).

DAMAGES AND SETTLEMENTS

Damages

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 at 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 if the plaintiff showed that he or she had exhausted all available means to substantiate and prove the damage or loss. While state 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). Damages may only be claimed as compensatory, consequential or incidental damages. However, Swiss law does not allow claims for punitive damages.

Settlements

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 as the board lacks the power to modify shareholder resolutions. Therefore, this settlement would require shareholder approval. However, settlement agreements under which the plaintiff shareholder withdraws the challenge are permissible. Moreover, it is permissible to settle liability claims (in the case of a liability action brought by the corporation, the representatives of the corporation must ensure that a settlement is in the best interest of the company as otherwise they may face liability).

THIRD PARTIES

Third parties preventing transactions

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

Unless the third party has specific contractual arrangements with the sellers or the target company (eg, 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 that 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 cause a transaction to fail through this litigation.

Third parties supporting transactions

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

Unless the 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 this 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, by challenging shareholder resolutions or by threatening to bring liability claims in the case of continued inaction. However, except in extraordinary circumstances, it would be difficult for shareholders to hold directors or officers liable for not having entered into M&A transactions.

UNSOLICITED OR UNWANTED PROPOSALS

Directors' duties

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.

COUNTERPARTIES' CLAIMS

Common types of claim

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 and 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.

As a result of the covid-19 pandemic, pre-closing disputes, in particular in relation to conditions precedent to closing (eg, absence of a material adverse change) or covenants on the conduct of business between signing and closing, have become somewhat more frequent during the last two years.

Differences from litigation brought by shareholders

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 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. The scope and binding effect of an arbitration clause in the articles of association have been controversial so far. However, from 1 January 2023, Swiss corporate law will include a specific provision pursuant to which an arbitration clause, which is provided for the articles of association of a corporation, is in principle binding for the company, its executive bodies, directors and officers as well as shareholders. It remains to be seen whether the practical relevance of arbitration for challenges to shareholder resolutions or liability actions will increase following the express authorisation of arbitration clauses in articles of association of a corporation.

UPDATES AND TRENDS

Recent developments

36 What are the most current trends and developments in M&A litigation in your jurisdiction?

Post-closing disputes between parties to an M&A transaction agreement over breaches of representations and warranties or price adjustments claims are fairly common in Switzerland. As a result of the covid-19 pandemic, pre-closing disputes, in particular in relation to conditions precedent to closing (eg, absence of a material adverse change) or covenants on the conduct of business between signing and closing, have become somewhat more frequent during the past two years. M&A litigation between the parties to an M&A transaction is often resolved through arbitration, in particular in international M&A transactions. While the number of disputes between the parties to an M&A transaction has 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 cases of high-profile litigation in the context of unfriendly takeovers and proxy fights. This litigation often involves multiple proceedings, such as requests for injunctive or interim relief in advance of general shareholders' meetings, challenges actions against shareholder resolutions and liability actions against directors and officers of the corporations involved. Unlike M&A disputes between the transacting parties, to date, these cases are almost exclusively litigated in state courts and often draw significant public attention. Among the most prominent cases of this M&A litigation during the past few years are the attempted takeover of Sika AG by Compagnie de Saint-Gobain, the proxy fights regarding Sunrise Communications AG and Schmolz + Bickenbach AG (now Swiss Steel Holding AG).

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TYPES OF SHAREHOLDERS' CLAIMS

Main claims

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

A responsible person of a company bears a duty of loyalty and a duty of care to the company and is liable for any loss or damage that the company sustains if he or she breaches these duties. Moreover, if a responsible person breaches these duties for his or her or any third party's interests, the shareholders may resolve to require the responsible person to repay the earnings therefrom within one year of them being generated (paragraphs 1 and 3, article 23 of the Company Act).

In addition, if a responsible person violates any law or regulation while conducting business, thereby causing any loss or damage to any other person, he or she and the company will be held jointly and severally liable to the injured person (paragraph 2, article 23 of the Company Act).

The term 'responsible person' refers to:

- directors;
- managers, supervisors, liquidators or temporary managers, promoters, supervisors, inspectors, reorganisers or the reorganisation supervisor of a company, when exercising their duties; and
- de facto directors, who are not directors but conduct business activities as a director or control the personnel or the financial or business operations of a company and instruct a director to conduct business.

De facto directors are subject to the same civil, criminal and administrative liabilities as directors. Unless stated otherwise, in this chapter 'directors' includes de facto directors.

If a director is in breach of the duties and obligations described above during an M&A transaction, the company may file a lawsuit against him or her within 30 days of the shareholders' resolution. In addition, the shareholder or shareholders holding at least 1 per cent of the total issued shares for six consecutive months may request that the supervisor file a lawsuit against the director.

If a shareholder has registered its objection to an M&A transaction and waived the right to vote on this transaction, the shareholder may request that the company purchase its shares in the company at the fair market price by sending the company a written notice specifying the suggested purchase price and returning the share certificates within the prescribed period. A company must reach a consensus with this shareholder and pay the purchase price within 90 days of the shareholders' resolution on the M&A transaction. If a company does not reach a consensus with the shareholder within 60 days of the shareholders' resolution on the M&A transaction, within 30 days of the end of the 60-day period the company should apply to the court for a ruling on the fair purchase price and name the shareholder as the respondent.

Requirements for successful claims

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

Shareholders must prove that the directors and officers violated laws (eg, the Company Act and the Enterprises Mergers and Acquisitions Act) and regulations, the company's articles of incorporation or the shareholders' resolution on the M&A transaction, thereby causing loss and damage to the company.

In most claims, shareholders must prove that the directors or officers breached their fiduciary duty by presenting evidence showing that the directors or officers did not take the essential factors into consideration or ignored the critical facts of the transaction (eg, the financial capability of the counterparty to conduct the transaction). Any evidence that the directors or officers gained unjust interests from conducting the transaction would also be helpful to the case.

Publicly traded or privately held corporations

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?

There is no difference between the claims that the shareholders of a publicly traded or privately held company can bring. However, the Securities and Futures Investors Protection Centre, a foundation established for the protection of public interests pursuant to the Securities Investors and Futures Traders Protection Act, may file a class action on behalf of the shareholders of publicly traded companies only.

Form of transaction

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

There is no difference between the claims that shareholders can bring depending on different forms of the transaction. Even though a company may not be a party in certain types of M&A transactions (eg, in a tender offer or share purchase), its directors and officers are required to provide transaction-related information to the shareholders or advise whether to participate in the transaction and, thus, may still be held liable in these transactions.

Negotiated or hostile transaction

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

There is no difference between the types of claims in a negotiated transaction and a hostile or unsolicited offer.

Party suffering loss

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

Only the party that suffered loss and damage may claim compensation. If a company suffers loss and damage, it may claim against its directors and officers. If a shareholder suffers loss and damage, it may claim against the company, directors and officers.

COLLECTIVE AND DERIVATION LITIGATION

Class or collective actions

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?

The shareholders suffering loss and damage may either claim independently or through a class action. The Securities and Futures Investors Protection Centre may file a class action on behalf of the shareholders of publicly traded companies.

The Securities and Futures Investors Protection Centre pays special attention to the prosecutors' investigations into cases regarding untrue or incorrect financial statements or prospectuses, the manipulation of stock prices and insider trading. If the prosecutors' office decides to indict, based on the facts found by the prosecutors, the Securities and Futures Investors Protection Centre will make a public announcement on its website to accept the shareholders' registration for a class action. The announcement includes:

the criteria of eligible shareholders (eg, the shareholders trading during a certain period);

the registration period;

the required documents and information, including:

- the application form;
- the trading records;
- the identification card or company registration card;
- the shareholder's bank account information;
- the letter of authorisation for the Securities and Futures Investors Protection Centre to take any and all actions required to exercise the rights;
- the letter of authorisation for the Securities and Futures Investors Protection Centre to collect the trading documents from the stock exchange, Taiwan Depository and Clearing Corporation, securities firms and other associations for the purposes of the court or arbitration proceedings;
- the consent letter authorising the Securities and Futures Investors Protection Centre to act on behalf of the shareholders in the court or arbitration proceedings; and
- the consent letter permitting the Securities and Futures Investors Protection Centre to collect, process and use the shareholders' personal information for the purpose of exercising the rights;
- the situations in which a claim will not be registered;
- the registration method; and
- other information.

Derivative litigation

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 holding at least 1 per cent of the total issued shares for six consecutive months may request that the supervisor file a lawsuit against the directors. If the supervisor does not file a lawsuit within 30 days of the request, the shareholders may file a lawsuit on behalf of the company and initially pay a court fee of up to NT$600,000. At the directors' request, the court may order the shareholders to post a security bond. If the judgment is against the shareholders, the shareholders will have to indemnify the company against any loss and damage.

INTERIM RELIEF AND EARLY DISMISSAL

Injunctive or other interim relief

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?

To prevent material harm, imminent danger or other similar circumstances, a person may seek to file a petition with the court for an injunction order. If necessary, the court may grant a stay order for a period of up to seven days, which may be extended by up to three days, before deciding on the petition for an injunction order. If the court dismisses the petition, the stay order will become invalid immediately. On the other hand, if the court grants an injunction order, and there is any discrepancy between the injunction order and the stay order, the injunction order will prevail. The court may enjoin M&A transactions but may not modify deal terms.

Early dismissal of shareholder complaint

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

To review a case, a court will schedule preparatory hearings to confirm that the procedural requirements for initiating a lawsuit are met before reviewing the evidence for the substantive issues. After the parties have presented evidence and stated their claims and arguments, debate hearings will be scheduled for the parties to provide their closing statements before the court renders a judgment. If the lawsuit has any procedural flaw that is not cured within the given period, the court may dismiss the lawsuit without reviewing the merits. If there is no procedural flaw, the court will review the merits and the defendants cannot seek an early dismissal.

Disclosure or discovery mechanisms do not apply in the Taiwanese legal system.

ADVISERS AND COUNTERPARTIES

Claims against third-party advisers

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

A company usually engages a third-party adviser to assist it in evaluating an M&A transaction and, thus, may claim against the adviser for breach of contract. Nevertheless, if the action of a third-party adviser is also deemed tort, thereby causing loss and damage to the company, the company may claim against the adviser on the grounds of tort as well.

If the company does not take any action against the adviser and the shareholders are entitled to claim against the company, the shareholders may claim against the adviser on behalf of the company. If the shareholders did not suffer any loss or damage directly caused by the adviser's act, they may not be entitled to claim against the third-party adviser directly.

Claims against counterparties

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

In the case of any dispute in an M&A transaction, a party may claim against the counterparty for breach of contract or tort, or both. If the company does not take action against the counterparty and the shareholders are entitled to claim against the company, the shareholders may claim against the counterparty on behalf of the company. If the shareholders did not suffer any loss or damage directly caused by the counterparty's act, they may not be entitled to claim against the counterparty directly.

A third person who has a legal interest in a lawsuit may intervene in the lawsuit while it is pending. An intervenor may support a party in the court proceedings but cannot take any action contrary to the party's actions (general intervention) or support a party in the court proceedings when the legal disputes must be resolved together to avoid any inconsistent judgments (independent intervention).

LIMITATIONS ON CLAIMS

Limitations of liability in corporation's constitution documents

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 corporation may stipulate in its articles of incorporation that the corporation will compensate board members and executives for any claims and actions against them when they exercise powers and perform duties in good faith. Some corporations further state in their articles of incorporation that they will procure directors' and officers' insurance coverage for the board members and executives. As the limitation of liability clause is self-explanatory and may be unenforceable when the claims or actions are caused by the directors' or executives' wilful acts or gross negligence, this clause is rarely stipulated in the articles of incorporation.

Statutory or regulatory limitations on claims

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 is no statutory or regulatory provision under Taiwan law that limits shareholders' right to bring claims against directors and officers in connection with M&A transactions.

Common law limitations on claims

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

Taiwan is a civil law country. When hearing a case against board members or executives in connection with an M&A transaction, the court will focus on whether the board members or executives have violated their legal duties or obligations, the corporation's articles of incorporation or the shareholders' resolution. When a court evaluates whether board members or executives are in breach of their fiduciary duty, the business judgment rule may be taken into consideration.

STANDARD OF LIABILITY

General standard

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 court will evaluate whether a board member or an executive has obtained sufficient information and comprehends this information to seek the company's best interests and decide whether to conduct an M&A transaction. Moreover, a court will evaluate whether a board member or an executive has exercised the duty of care as knowledgeable professionals do in similar transactions. In practice, companies would engage attorneys, certified public accountants and other professionals and independent advisers to evaluate a proposed M&A transaction and obtain a fairness opinion to prove that the board and the executives have taken the necessary actions before deciding whether to conduct an M&A transaction.

Type of transaction

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

The standard does not vary depending on the type of consideration being paid to the seller's shareholders. If the consideration is not paid in cash, directors and executives will have to ensure that the value of the consideration in kind is the same as that declared by the counterparty.

Type of consideration

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

The standard does not vary depending on the type of consideration being paid to the seller's shareholders. If the consideration is not paid in cash, directors and executives will have to ensure that the value of the consideration in kind is the same as that declared by the counterparty.

Potential conflicts of interest

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 does not vary if one or more directors or officers have potential conflicts of interest in connection with an M&A transaction. In the case of any conflicts of interest, a director must report this fact at a board meeting. If the interest relates to a director's spouse, first- or second-degree blood relatives or a company with a controlling or subordinate relationship with the director, the director will be deemed to have conflicts of interest. This director should refrain from voting at the board meeting or acting as a proxy, and his or her attendance at the board meeting will not be taken into account in determining whether the quorum has been met.

In the case of a public company, if the conflicts of interest may jeopardise the company's interests, in addition to the above reporting obligation, the director should not participate in any discussion or voting or act as a proxy.

Controlling shareholders

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 rateably with all shareholders?

The standard does not vary if a controlling shareholder is a party to the transaction. However, as all the shareholders should be treated the same, a controlling shareholder cannot receive consideration in connection with the transaction that is not shared with all shareholders pro rata pursuant to their respective shareholdings.

INDEMNITIES

Legal restrictions on indemnities

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 Taiwanese law, there is no legal restriction on a company's ability to indemnify, or advance the legal fees of, its officers and directors named as defendants. Nevertheless, if an officer or a director is found to have gained unjust personal interests, committed any illegal act or breached his or her duties or obligations in the transaction, it would be inappropriate for the company to indemnify his or her legal fees.

M&A CLAUSES AND TERMS

Challenges to particular terms

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

Shareholders may challenge particular clauses or terms in M&A transaction documents if these clauses or terms are clearly unfavourable to the company without any justification.

PRE-LITIGATION TOOLS AND PROCEDURE IN M&A LITIGATION

Shareholder vote

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

If the shareholders adopt a resolution on filing a lawsuit against the directors for an M&A transaction, the company must file the lawsuit within 30 days of the shareholders' resolution.

Insurance

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

A company may procure liability insurance for its directors to cover their liabilities arising from exercising their duties during the office term. If a company procures this insurance for its directors, it should report the important terms of insurance, including but not limited to the insured amount, coverage and premium rate, at the next board meeting.

The companies traded on the Taiwan Stock Exchange or the Taipei Exchange are required to procure insurance covering their directors' and supervisors' liabilities arising from exercising their duties. A company that fails to procure this insurance will incur a fine, which may be imposed consecutively until the company rectifies this failure. Moreover, the Taiwan Stock Exchange and the Taipei Exchange may disclose the name of the non-compliant company on their websites.

Burden of proof

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 falls on the party making the claim and does not shift. The facts that are exempt from this burden of proof include those:

- generally known or known to the court in the course of exercising its powers;
- acknowledged and recognised by both parties;
- claimed by a party and not objected to by the other party;
- presumed de jure without evidence showing otherwise;
- that may be inferred from the facts already known to the court; and
- that may be proved by evidence, which nevertheless is destroyed or concealed intentionally by the party holding this evidence.

Pre-litigation tools

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

Shareholders are entitled to request a copy of the articles of incorporation, the minutes of the shareholders' meetings, the financial statements, the roster of shareholders and the counterfoil of corporate bonds from a company. In addition, shareholders may request that the supervisor review a company's business and financial conditions and inspect or duplicate relevant accounting books and records. Shareholders holding 1 per cent or more shares for six consecutive months may apply to the court to appoint an inspector to inspect the company's business and accounting records and property, and to inspect certain matters and the documents and records of certain transactions.

Further, if shareholders believe that certain evidence may be lost or may not be presented, before or during the lawsuit, they may apply to the court to perpetuate evidence.

Forum

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

A lawsuit must be filed with the court that has jurisdiction as stated under the Code of Civil Procedure. The court in the area where a defendant resides or is registered may hear the case. In addition, the court in the area where an obligation should have been performed or a tort act is committed may hear the case. If there are two or more defendants and different courts have jurisdiction over different defendants, any of the foregoing courts may hear the case.

If the claim amount against a company's responsible person in an M&A transaction reaches NT$100 million, the Commercial Court will hear the case. The Commercial Court will also hear the case where a shareholder in a public company claims against the company or its responsible person by exercising the shareholder's right.

Expedited proceedings and discovery

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

The discovery mechanism does not apply in Taiwan. The courts investigate evidence during court proceedings. There is no mechanism to expedite the proceedings of an M&A lawsuit.

DAMAGES AND SETTLEMENTS

Damages

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

There is no clear rule on calculating damages in M&A lawsuits. However, any claim can only cover the actual loss and damage, which includes the profit that would have been gained in general situations based on a determined plan, facilities or other circumstances (ie, expected loss).

Settlements

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

The Securities and Futures Investors Protection Centre plays an active role in M&A transactions to protect investors' interests. If the Centre initiates a class action to act as the plaintiff, it will obtain the shareholders' authorisation to reach a settlement with the liable persons; thus, it may, at its discretion, make a decision for the shareholders on the settlement terms. Hence, the Centre's attitude is critical when a defendant wishes to settle with the shareholders in an M&A class action.

THIRD PARTIES

Third parties preventing transactions

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

For an M&A transaction, a company is required to make a public announcement and notify its creditors. Even if any creditor objects to the transaction within the prescribed period, the objection will not be an obstacle to the closing of the transaction. In response to any such objection, the company may repay the creditor, provide the corresponding guarantee, establish a trust for the exclusive purpose of repayment or present evidence showing that the transaction will not damage the creditor's rights.

Given the above, third parties may not have legal ground to file a lawsuit to stop an M&A transaction prior to closing.

Third parties supporting transactions

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

Except for the matters that require the shareholders' resolution under the Company Act or the articles of incorporation, a company should operate business based on board resolutions. As an M&A transaction may be deemed a company's business operation strategy, and the board is authorised to decide how to operate the company, third parties may not have the legal ground to use litigation to force or pressure a company to enter into an M&A transaction.

UNSOLICITED OR UNWANTED PROPOSALS

Directors' duties

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?

When a corporation receives an unsolicited or unwanted proposal to enter into an M&A transaction, the directors should still exercise their duty of care to deal with the proposal in the best interests of the corporation.

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If a corporation is a public reporting company, before convening a board meeting to discuss and resolve an M&A transaction, it should form a special committee to evaluate the fairness and reasonableness of the transaction and report its evaluation result at a board meeting and a shareholders' meeting, if applicable. The special committee must retain an independent expert to issue a fairness opinion for reference. If a corporation has an audit committee, the audit committee may assume the role of the special committee.

COUNTERPARTIES' CLAIMS

Common types of claim

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

A breach of contract is one of the most common types of claim asserted by and against counterparties to an M&A transaction.

Differences from litigation brought by shareholders

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

The legal basis of a lawsuit between the parties to an M&A transaction may be based on the transaction documents (eg, breach of contract) and tort, while a lawsuit brought by shareholders may be based on tort only.

UPDATES AND TRENDS

Recent developments

36 What are the most current trends and developments in M&A litigation in your jurisdiction?

Filing a petition for an injunction order in disputes of M&A transactions before a lawsuit is filed has become more common, especially in the case of a hostile or unsolicited takeover.

United States

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TYPES OF SHAREHOLDERS' CLAIMS

Main claims

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

Shareholders typically assert three types of claims in connection with M&A transactions. First, shareholders may assert claims under US securities law. Section 14 of the Securities Exchange Act of 1934 prohibits materially false or misleading representations in connection with a proxy solicitation. After the parties announce their agreement to combine and begin making proxy filings with the SEC, shareholders often bring Section 14 claims alleging that the company's proxy disclosures are false or misleading.

Second, shareholders may assert breach of fiduciary duty claims. Directors and officers owe several fiduciary duties to shareholders, including the duty of care and the duty of loyalty. Claims based on the board's fiduciary duties are governed by state law – typically common law.

Third, shareholders may assert claims under state statutes, including requests for appraisal and books and records demands. Appraisal rights allow shareholders to request a judicial valuation of their shares and seek a judicial determination of the 'fair value' of their shares. Books and records demands allow shareholders to review the company's books and records (typically board materials and perhaps other company records) further to a proper purpose. If the company does not make its books and records available, shareholders may ask the court to compel production.

This chapter discusses the most common US legal concepts in the context of M&A litigation, using Delaware law as the standard for state law issues unless otherwise specified. In the United States, most public companies are incorporated in Delaware, and Delaware M&A law is well-developed and highly regarded by other states, many of which have adopted broadly similar fiduciary duty standards and statutory rights.

The following responses are provided as general guidance only, and should not be construed as opinions or views on any specific set of facts or transactions.

Requirements for successful claims

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

To succeed on a claim under Section 14 of the 1934 Act, shareholders must prove that the proxy statement contained a material misrepresentation or omission that induced shareholders to authorise the transaction (and (or) to forgo redemption rights) and caused injury to shareholders. In some circumstances, shareholders also need to show that the misrepresentation or omission was intentional.

To prevail on a breach of fiduciary duty claim, the shareholder must prove the existence of a fiduciary duty and a breach of that duty. For a breach of the duty of care, shareholders must show that the defendants acted with gross negligence, which means 'conduct that constitutes reckless indifference or actions that are without the bounds of reason' (*Zucker v Hassell*, 2016 WL 7011351, at *7 (30 November 2016)). For a breach of the duty of loyalty, shareholders must show that the board failed to act in the best interests of the company and its shareholders.

To invoke statutory appraisal rights, shareholders must generally perfect those rights by making the requisite demands for appraisal to the company, and the shareholder may not vote in favour of the transaction. The court then determines the 'fair value' of the shares, which is the 'value to a stockholder of the firm as a going concern' (*Golden Telecom, Inc v Global GT LP*, 11 A3d 214, 217 (Del 2010)). To make a books and records demand, the shareholder must generally specify a proper purpose for the inspection that is 'reasonably related to [the] person's interest as a stockholder', and the stockholder is entitled to only those books and records 'necessary and essential to accomplish the stated, proper purpose' (*AmerisourceBergen Corp v Lebanon Cty Emps' Retirement Fund*, 243 A3d 417, 425–27 (Del 2020)).

Publicly traded or privately held corporations

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?

Shareholder plaintiffs are generally more active in M&A transactions involving publicly traded companies, and frequently assert claims under US securities law and for breaches of fiduciary duties. In some situations, appraisal rights are not available for public transactions. In transactions involving privately held companies, claims are typically brought by the buyers or sellers and generally arise out of the contract.

Form of transaction

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

In some cases, yes. Claims alleging breaches of fiduciary duty typically do not differ depending on how the transaction is structured. However, in a sale that involves a 'change of control' where *Revlon* duties (*Revlon, Inc v MacAndrews & Forbes Holdings, Inc*, 506 A2d 173 (Del 1986) (*Revlon*)) would ordinarily attach to the board's decision, a merger structured as a tender offer followed by a back-end merger may be reviewed under the business judgment rule.

Claims under Section 14 of the Securities Exchange Act of 1934 may differ depending on whether the transaction is structured as a merger, in which case intent to deceive investors is not necessarily an element, or structured as a tender offer, in which case intent is an element.

Negotiated or hostile transaction

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

Generally, no – except, of course, that the hostile bidder (a shareholder) may well sue the company and its board on claims related to the hostile bid. Boards are permitted to adopt certain defensive measures in response to a hostile offer, which courts will uphold if the board had 'reasonable grounds for identifying a threat to the corporate enterprise' and 'the response was reasonable in relation to the threat posed' (*Williams Companies Stockholder Litig*, 2021 WL 754593, at *2 (Del Ch 2021)).

Party suffering loss

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 the corporation belong to the corporation, so shareholders asserting such claims do so in a derivative capacity. Derivative claims must satisfy certain procedural requirements, and any recovery flows to the company. Derivative claims may be extinguished if the corporation that owns the claim no longer exists as a result of the transaction.

Claims for losses suffered by the shareholder belong to the shareholder, and may be asserted directly (either as an individual action or as a class action) against the alleged wrongdoer. Any recovery from a direct suit flows to the shareholders, rather than the company.

Claims under US securities law and state statutes, such as appraisal rights and books and records demands, are generally direct claims, although there are some derivative federal securities claims. Claims for breach of fiduciary can be either direct or derivative, depending on whether the claimed harm was suffered by the shareholders or the company.

COLLECTIVE AND DERIVATION LITIGATION

Class or collective actions

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. To maintain a class action, the representative shareholder or group of shareholders must show that:

- the class is so numerous that joining all members of the class in a single case would be impracticable;
- there are questions of law or fact commonly applicable to all class members;
- the claims of the class representative are typical of the claims of other class members; and
- the representative will adequately protect the interests of other class members.

In addition, the class representative must show that either common questions of law or fact predominate over individualised issues, there is a risk of inconsistent adjudications if the claims were brought individually, or the action seeks appropriate class-wide injunctive relief.

Derivative litigation

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 may bring a derivative lawsuit on behalf of the corporation, but must typically satisfy several procedural requirements. The shareholder must either:

- make a pre-suit demand on the board asking the corporation to pursue its claim, which the corporation must wrongfully refuse; or
- show that the demand would have been futile because the board was incapable of impartially evaluating the demand.

The plaintiff must also remain a shareholder from the time of the alleged misconduct through the conclusion of the litigation. Further, any settlement must be approved by the court.

INTERIM RELIEF AND EARLY DISMISSAL

Injunctive or other interim relief

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?

Yes. US courts may issue injunctive relief to enjoin the closing of an M&A transaction in certain situations. To determine whether injunctive relief is appropriate, courts generally consider whether the moving party has a reasonable probability of success on the merits, whether the moving party will suffer immediate and irreparable harm absent the requested injunctive relief, and whether the balance of the equities favours injunctive relief. Courts may also modify or strike specific deal terms. As a general matter, damages are more likely to be awarded by US courts than injunctive relief.

Early dismissal of shareholder complaint

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

Yes. Defendants may seek early dismissal by filing a motion to dismiss. Motions to dismiss may be premised on procedural grounds or substantive grounds, such as a shareholder's failure to plead an actionable claim. For a claim under federal securities law, the filing of a motion to dismiss will typically trigger an automatic stay of discovery through the resolution of such motion. For other shareholder claims, courts have discretion to stay discovery while a motion to dismiss is pending.

ADVISERS AND COUNTERPARTIES

Claims against third-party advisers

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

Yes. Shareholders may assert claims against third-party advisors for aiding and abetting an alleged breach of fiduciary duties. In addition to showing that a fiduciary duty existed and the board breached the duty, a shareholder bringing an aiding and abetting claim must show that the third-party advisor 'knowingly participated in a breach' and that the 'damages to the plaintiff resulted from the concerted actions of the fiduciary and the non-fiduciary' (*Gotham Partners LP v Hallwood Realty Partners LP*, 817 A2d 160, 172 (Del 2002)).

Claims against counterparties

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

Yes. Shareholders may likewise assert claims against the counterparty in a transaction for aiding and abetting an alleged breach of fiduciary duties. These claims typically involve allegations that the bidder created or exploited conflicts of interest in the target company's board, or conspired with the board to cause a fiduciary breach. However, attempts to obtain better value through arms'-length negotiation does not alone give rise to aiding and abetting liability. Shareholders of target companies may also assert claims under federal securities law against bidders that make allegedly false or misleading representations in joint proxy statements or in connection with a tender offer.

LIMITATIONS ON CLAIMS

Limitations of liability in corporation's constitution documents

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 states allow corporations to include in their certificates of incorporation a provision, which can be referred to as an exculpatory provision, eliminating the personal liability of directors for monetary damages arising out of breaches of the duty of care. However, these provisions do not eliminate the liability of company officers, and do not eliminate liability for directors found to have breached their duty of loyalty or acted in bad faith. These exculpatory provisions do not preclude shareholders from seeking non-monetary relief such as injunctive relief.

Statutory or regulatory limitations on claims

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?

Yes. The statute of limitations determines how long shareholders have to bring claims in connection with an M&A transaction. For federal Section 14 claims, shareholders must generally bring suit within three years of the date of the allegedly false or misleading disclosure. For claims based in state law, the statute of limitations varies across states. In Delaware, for example, the statute of limitations for claims asserting a breach of fiduciary duty is three years from the date the claim accrues. In certain situations, courts may exercise their equitable powers to disregard or toll the statute of limitations in a particular case.

Common law limitations on claims

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 business judgment rule is a common law presumption that the board made the business decision 'on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the company' (*McMullin v Beran*, 765 A2d 910, 916 (Del 2000)). The shareholder plaintiff bears the burden of rebutting the business judgment rule by providing evidence that the board breached its fiduciary duties.

STANDARD OF LIABILITY

General standard

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 general standards: the business judgment rule, enhanced scrutiny and entire fairness.

Business judgment rule

The default standard of review is the business judgment rule, under which the court will presume the defendants acted in accordance with their fiduciary duties. As long as the defendants can proffer a rational business justification for their decision, the court will not second-guess their decision.

Enhanced scrutiny

Enhanced scrutiny is the intermediate standard of review. Forms of enhanced scrutiny apply to certain transactions involving a sale or break-up of the company and to defensive actions taken by boards in response to takeover proposals. To satisfy enhanced scrutiny, defendants must generally show that 'their motivations were proper and not selfish' and that 'their actions were reasonable in relation to their legitimate objective' (*Firefighters' Pension Sys v Presidio, Inc*, 251 A3d 212, 249 (Del Ch 2021)).

Entire fairness

The most onerous standard is entire fairness review. Once entire fairness review applies, the board must prove to the court that 'the transaction was the product of both fair dealing and fair price' (*Firefighters' Pension Sys v Presidio, Inc*, 251 A3d 212, 249 (Del Ch 2021)).

The standard of review is frequently dispositive of the outcome in M&A litigation. If the business judgment rule applies, the board's decision will generally be upheld. On the other hand, entire fairness review favours plaintiff shareholders, because it places the burden on the board to prove that all aspects of its decision were objectively fair. Entire fairness review is also fact-intensive, and usually resolved at trial rather than by pre-trial motions.

Type of transaction

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

Yes, in certain cases. When a corporation initiates an auction to sell or break up the company for cash, or abandons a long-term strategy in response to a bidder's offer and seeks alternative cash transactions to break up the company, or the M&A transaction involves a 'change of control', *Revlon* duties (*Revlon, Inc v MacAndrews & Forbes Holdings, Inc*, 506 A2d 173 (Del 1986) (*Revlon*) may attach to the board's decision. When *Revlon* duties apply, the board's goal is to get the best price for the shareholders from the sale of the company. Courts will review the board's decision under a form of enhanced scrutiny, where the board bears the burden of proving that it acted reasonably to maximise shareholder value. Interested transactions, such as going-private transactions involving a controlling shareholder, are reviewed under the entire fairness standard in certain circumstances.

M&A transactions that do not involve a potentially interested party, such as a merger between corporations without a controlling shareholder or a sale to an unaffiliated financial sponsor, are generally reviewed under the business judgment rule.

Type of consideration

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

Yes, in certain cases. The type of consideration may determine whether *Revlon* duties attach to a board's decision to approve an M&A transaction. In a sale of a company for cash, where the shareholders' interest in the company would be terminated by the transaction, *Revlon* duties generally apply and boards must maximise the present value for the shareholders. In a sale for stock that does not involve a change of control, such as when control of the merged entity remains in a large and fluid market, *Revlon* duties do not apply to the board's decision. M&A transactions that offer a mix of cash and stock as consideration are evaluated case by case, but US courts tend to find that *Revlon* duties apply where 50 per cent or more of the consideration is in cash.

Potential conflicts of interest

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

Yes, in certain cases. If a majority of the directors on the board have a material conflict of interest with respect to the M&A transaction, the board's decision is usually reviewed under the entire fairness standard. In some circumstances, if an interested director was able to control or dominate the board as a whole, the court may also apply entire fairness review to the board's decision. Under entire fairness review, the board must show that the transaction was the product of both fair dealing and fair price.

Controlling shareholders

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 rateably with all shareholders?

Yes, in certain cases. Courts typically review M&A transactions that involve a controlling shareholder who 'competes with other stockholders for consideration or otherwise receives a non-ratable benefit at the expense of minority shareholders' under the entire fairness standard (*In re Viacom Inc Stockholders Litig*, 2020 WL 7711128, at *16 (Del Ch 2020)). But if the transaction replicates an arms'-length transaction by, at the outset, conditioning the transaction upon:

- the 'approval of an independent, adequately-empowered Special Committee that fulfills its duty of care'; and
- the 'uncoerced, informed vote of a majority of the minority stockholders', then the business judgment rule applies and the court will not second-guess the transaction (*Flood v Synutra Int'l, Inc*, 195 A3d 754, 755–56 (Del 2018)).

If only one of those two procedural safeguards exists, courts will review the transaction under the entire fairness standard but shift the burden of proving unfairness onto the plaintiff.

INDEMNITIES

Legal restrictions on indemnities

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. Companies are generally permitted to indemnify directors and officers unless a court determines that the director or officer failed to act in good faith or in a manner they believed was in the best interests of the company, or, in the case of a criminal proceeding, the director or officer had reasonable cause to believe their conduct was unlawful. For lawsuits brought by the company, including derivative lawsuits, indemnification for liability is only permitted if the court determines that indemnification is fair and reasonable. If a director or officer is successful in defending against shareholder litigation, companies are typically required to indemnify the director or officer for expenses and fees incurred in the litigation.

Companies are generally permitted to advance expenses and attorneys' fees to directors or officers defending against litigation, so long as the director or officer undertakes to repay the advanced fees if the director or officer is ultimately found ineligible for indemnification.

M&A CLAUSES AND TERMS

Challenges to particular terms

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

Yes. Shareholders often challenge deal protection devices in an M&A agreement that may deter other bidders, such as terminations fees, standstills, and 'no shop' or 'no talk' clauses. Courts generally review these deal protection devices under enhanced scrutiny review. So long as the deal protection devices in an M&A agreement 'are not draconian (preclusive or coercive) and are within a "range of reasonableness"', courts will generally enforce the deal protection provisions (*Omnicare, Inc v NCS Healthcare, Inc*, 818 A2d 914, 932 (Del 2003)).

PRE-LITIGATION TOOLS AND PROCEDURE IN M&A LITIGATION

Shareholder vote

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

In an M&A transaction without a controlling shareholder, a fully informed and uncoerced shareholder vote that ratifies the decision of the board will result in an application of the business judgment rule that is irrebuttable by the plaintiff. The shareholder vote 'cleanses' any potential breach of fiduciary duty by the board, and thus the business judgment presumption applies even if the board's decision standing alone would have been reviewed under a different standard. The plaintiff may, however, challenge the adequacy of the board's disclosure of information to shareholders, in which case the board bears the burden of showing that the shareholder vote was fully informed.

In addition, if a shareholder votes in favour of an M&A transaction, the shareholder may not later invoke its appraisal rights.

Insurance

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

Directors' and officers' insurance mitigates the risk that officers or directors will be personally liable as a result of shareholder litigation. For that reason, companies generally purchase directors' and officers' insurance to cover the types of shareholders' claims that may arise out of an M&A transaction. The details of the insurance policy, such as the deductible and the coverage amount, may influence the parties' willingness or ability to settle shareholder litigation. Over the past few years, directors' and officers' insurance has increased in cost, resulting in higher premiums, higher deductibles and (or) lower coverage limits.

Burden of proof

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?

Plaintiffs bear the burden of proof under the default standard of review in M&A litigation, which is the business judgment rule. The business judgment rule presumes that the board acted in accordance with its fiduciary duties, and the plaintiff shareholder bears the burden of rebutting that presumption by providing evidence that the board breached one of its fiduciary duties. If the plaintiff successfully rebuts the presumption, then the burden shifts to the board to prove the M&A transaction meets the 'entire fairness' standard.

Similarly, in other situations where the entire fairness standard of review applies, such as a transaction involving a controlling shareholder, the board usually bears the burden of proving the transaction was fair. However, if certain procedural safeguards are present, the burden may shift to the plaintiff to prove the transaction was unfair.

Pre-litigation tools

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

Yes. Many states provide shareholders a qualified right to inspect the company's books and records. To make a book and records demand, the shareholder must generally make the request under oath and in writing, and specify a proper purpose of the inspection. A proper purpose is commonly to investigate suspected wrongdoing, such as potential breaches of fiduciary duties by the board, but the shareholder must have a credible basis for the suspected wrongdoing. If a shareholder makes a proper demand, the shareholder is entitled to the books and records that are necessary and essential to the purpose of the demand. The types of documents available to the shareholder may extend in some circumstances to informal records such as electronic documents and communications. However, the scope of documents available through a books and records demand is narrower than is obtainable through ordinary discovery during litigation.

Companies may resist a books and records demand on the ground that the shareholder failed to state a proper purpose or because the scope of the demand is too broad. Companies may also impose reasonable conditions on the production of books and records to protect their legitimate interests (eg, confidentiality restrictions).

Shareholders have increasingly turned to books and records demands to seek documents in connection with M&A transactions as a result of courts' 'encouragement of stockholders, who can show a proper purpose, to use the "tools at hand" to obtain the necessary information before filing a derivative action' (*Seinfeld v Verizon Communications, Inc*, 909 A2d 117, 120 (Del 2006)).

In limited circumstances, parties engaged in litigation in foreign jurisdictions may seek discovery in US court from US companies or individuals under the federal statute, 28 USC section 1782. The discovery must be for use in a foreign or international proceeding and the request must be made by an interested party to that proceeding. Courts have discretion to grant or deny the requested discovery and will consider several factors, including whether the discovery request is an attempt to circumvent foreign laws. Courts may also modify or impose conditions on the discovery.

Forum

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

Yes. A shareholder may only bring litigation in a court that has both jurisdiction over the subject matter and personal jurisdiction over the defendant. Subject matter jurisdiction concerns the court's authority to decide the specific claims. A federal court generally has subject matter jurisdiction to hear:

- claims based on federal law;
- non-federal claims that arise out of the same facts as a federal claim in the same litigation; and
- non-federal claims between parties from different states or between a foreign party and a US party.

State courts generally have broader and more general subject matter jurisdiction, but typically do not have jurisdiction over M&A litigation arising out of US securities law.

Personal jurisdiction concerns the court's authority over the defendant, and can be general or specific to the claim being litigated. General personal jurisdiction exists in the state where the defendant is domiciled, which for corporations is the state of incorporation and the principal place of business. General personal jurisdiction also exists if the corporation is otherwise 'at home' in the state, although this basis for personal jurisdiction is exceptionally limited. Specific personal jurisdiction depends on whether the defendant has sufficient minimum contacts with the forum state for the exercise of jurisdiction to be fair.

Corporations may adopt forum selection provisions in their charter or bylaws requiring certain shareholder claims to be brought in specific courts, so long as these provisions do not violate state law or public policy. Provisions regulating the forum for 'internal affairs' litigation, such as breach of fiduciary duty claims, are clearly enforceable, and provisions requiring claims under US securities law to be brought in federal court may also be enforceable (*Salzberg v Sciabacucchi*, 227 A3d 102, 131 (Del 2020)).

Expedited proceedings and discovery

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

Yes. Expedited proceedings are generally available in M&A litigation seeking injunctive relief. The plaintiff must articulate a sufficiently colourable claim and show a sufficient possibility of irreparable harm. The court has discretion to expedite proceedings. If the court allows expedited proceedings, the result is usually an expedited discovery schedule and hearing date.

The most common discovery issues involve the responsiveness of documents and attorney-client privilege. In some jurisdictions, the fiduciary exception to the attorney-client privilege may apply in shareholders' derivative suits and related books and records demands in certain situations. The plaintiff must show good cause to overcome the privilege, and the exception is intended to be very difficult to satisfy. In addition, discovery of documents located internationally may be subject to foreign restrictions on disclosure, such as the EU General Data Protection Regulation.

DAMAGES AND SETTLEMENTS

Damages

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

Shareholders typically seek either rescissory or compensatory damages. Rescissory damages are the monetary equivalent of rescission, and attempt to restore the shareholders to their position before the alleged wrongdoing. Compensatory damages seek to make shareholders whole by awarding damages that make up the difference between the value they received and the value they would have received absent the alleged wrongdoing. Plaintiffs and defendants usually retain economic experts to contest the amount of damages. Experts should generally use accepted valuation methodologies, and parties may ask the court to exclude the testimony of experts who fail to do so.

Settlements

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

Settlements of derivative suits and class actions require approval by a court. As part of the approval process, the representative shareholders must generally provide notice of the settlement to other shareholders and allow them an opportunity to object to the settlement. At the settlement hearing, the court decides whether the settlement is adequate by considering factors such as the validity of the claim and the cost of litigation. The court also determines the reasonableness of attorneys' fees negotiated by the representative shareholders.

Most M&A transactions are subject to litigation related to the seller's disclosures, which frequently result in an expedited settlement with a broad release of liability from the plaintiff class and a significant fee for plaintiffs' counsel. Alternatively, parties may reach an agreement that the claim is mooted by a supplemental disclosure, which results in a narrower release of liability without prejudice to other putative class members.

THIRD PARTIES

Third parties preventing transactions

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

Yes. Financial and strategic bidders interested in making a topping bid may challenge deal protection devices in an M&A transaction, such as a standstill provision, and seek an injunction preventing the transaction from closing. Private parties and government agencies may also seek to enjoin the M&A transaction under state and federal antitrust laws.

Third parties supporting transactions

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

A bidder may challenge the board's decision to adopt defensive measures in response to a takeover proposal, although the bidder must generally hold some shares. Financial buyers may also initiate a proxy contest for control of the board and make a related books and records demand to pressure the company into a transaction. However, the demand must state a proper purpose and any production may be limited to documents necessary and essential to the proxy fight.

UNSOLICITED OR UNWANTED PROPOSALS

Directors' duties

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's fiduciary duties of care, loyalty, and good faith apply when it receives an unsolicited or unwanted proposal. The board can satisfy those duties by, for example, evaluating the proposal in an informed and diligent way. The board may also adopt defensive measures, such as shareholder rights plans (sometimes called 'poison pills'). Courts typically uphold these defensive measures if the board had 'reasonable grounds for identifying a threat to the corporate enterprise' and 'the response was reasonable in relation to the threat posed' (*Williams Companies Stockholder Litig*, 2021 WL 754593, at *2 (Del Ch 2021)). If a board seeks out alternative transactions or initiates an active bidding process for the sale or break up of the company for cash, the board's duty is to maximise the value of the transaction for shareholders.

COUNTERPARTIES' CLAIMS

Common types of claim

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

In private transactions, the most common claims are breach of contract claims based on the M&A agreement, such as breaches of the representations and warranties or provisions for purchase price adjustments and earn-outs. Buyers typically shift the risk of a breach of the representations and warranties onto the seller through an indemnification provision backed by an escrow account or purchase representation and warranties insurance. Buyers may also assert fraud claims, such as fraudulent inducement.

Differences from litigation brought by shareholders

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

Shareholder litigation is usually brought in a representative capacity on behalf of other shareholders or on behalf of the company and is generally premised on the board's fiduciary duties and disclosure obligations. Litigation between the parties in a transaction is typically brought as a direct claim based on a contract negotiated at arms'-length, so neither party owes the other any fiduciary duties and the claims depend on the terms of the contract.

UPDATES AND TRENDS

Recent developments

36 What are the most current trends and developments in M&A litigation in your jurisdiction?

As a result of the covid-19 pandemic, many buyers that had agreed to M&A transactions before the pandemic began to re-evaluate the pending transactions in industries affected by the pandemic. Some buyers have turned to litigation, where they typically argue that the pandemic's effect on the seller's business constitutes an adverse material effect or the seller's response to the pandemic was a deviation from the ordinary course of business.

Courts have generally found that the pandemic does not constitute a material adverse effect, because the pandemic did not create

a 'sustained drop' in the seller's business performance, especially as businesses have started recovering. M&A agreements also typically include exceptions for effects caused by changes in laws or government policies, which courts have found applicable where the seller's revenue declines during the pandemic were caused largely by government pandemic policies. Moreover, buyers have generally been unable to show that the pandemic had a disproportionate impact on the seller compared to other similarly situated companies.

Buyers have found more success making ordinary course arguments. Some courts have found that a seller's reasonable responses to the pandemic may constitute a breach of an ordinary course covenant where the covenant required the seller to operate 'only' in the ordinary course and consistent with past practice in 'all material respects'. Thus, if the terms of the covenant are absolute and leave no room for qualifiers such as commercially reasonable efforts, a seller's reasonable changes to its business during the pandemic may breach the covenant and excuse the buyer from closing.

Additionally, in response to the covid-19 pandemic, the US government passed the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), which created several relief programmes including the Paycheck Protection Program for small businesses and certain forms of tax relief. The CARES Act also authorised up to US$454 billion to fund various credit facilities that offered loans to small and medium-sized businesses. Although participation in these facilities has closed, loan recipients are bound by certain restrictions on stock buybacks and executive compensation until 12 months after the loans have been repaid. Companies interested in an M&A transaction with businesses that received loans or other relief under the CARES Act and similar pandemic legislation may consider whether the associated restrictions may affect the value or viability of the transaction.

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TYPES OF SHAREHOLDERS' CLAIMS

Main claims

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 sections 105, 106 and 107 of the Companies Act (Law No. 10 of 2017 (CA 2017)) and they also owe fiduciary duties to the company they work for. With respect to M&A transactions, the most important duties owed by a director are as follows:

- to prevent, reduce and manage any attendant risks to the business of the company;
- not to cause, allow or agree for the business of the company to be conducted in a manner that is likely to create a substantial risk of serious loss to the shareholders;
- to exercise a degree of reasonable care, diligence and skill that may reasonably be expected of a person carrying out the functions of a director;
- 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;
- to promote the success of the company;
- to exercise independent judgement;
- to disclose information about his or her remuneration in the financial statements of the company; and
- 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.

The most common claims in Zambia have been with respect to directors acting against the interests of the company regarding the undervaluation of shares for purposes of the Property Transfer Tax. Other claims that are likely to arise would be with regard to the non-disclosure of particular warranties and conditions that would impact the company after the sale on account of a director failing to exercise independent judgement. Lastly, claims may arise concerning conflicts of interest with regard to a lack of confidentiality on account of a director disclosing critical information discussed by the board relating to a merger or acquisition of third parties.

Requirements for successful claims

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

In the event of a breach of duty by a director, the shareholders can commence an action for breach of statutory duty or an illegal act. For the cause of action to succeed the shareholders must demonstrate that there was negligence and breach of duty. As the cause of action is founded on the law of tort, the shareholders must prove duty of care, foreseeability, negligence and remoteness of damage.

The right of the shareholders to commence an action against the director is specifically provided under section 138 of the CA 2017. This provision is yet to be tested by the Zambian judiciary as the CA 2017 has only been in force for two years.

Alternatively, section 335 of the CA 2017 allows a shareholder to bring an action against a director for breach of duty owed to the shareholder or former shareholder. Additionally, a shareholder may also bring an action against the company for breach of a duty owed by the company to the shareholder.

An injunction is also available to a shareholder to prevent a director from engaging in conduct that contravenes his or her fiduciary and other duties under the CA 2017 and the articles of association.

The mode of commencement of proceedings with respect to the directors is generally by a writ of summons in the Commercial Division of the High Court.

Publicly traded or privately held corporations

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 are eligible to bring claims in both publicly traded and privately traded companies. When the shares are publicly traded, the trading companies are regulated by the CA 2017, the Securities Act (Law No. 41 of 2016) and the harmonised listing requirements of the Lusaka Stock Exchange, also known as the Listing Rules.

Takeovers of publicly listed companies are additionally regulated by the Securities (Takeover and Mergers) Rules Statutory Instrument (Law No. 170 of 1993). There is no case law in Zambia with regard to claims by shareholders directly linked to a director's breach of statutory duty. It is common, however, during a mandatory takeover, for shareholders to reject the basis of valuation of their shares. This was the issue in the case of *Chanda Mutoni and Others v Bharti Airtel Zambia Holdings Bv, Celtel Zambia Plc* 2011/HPC/0134 and *Reynolds Chanda Bowa and Puma Energy (Ireland) Holdings Limited* 2011/HPC/0263. The two cases related to the interpretation of section 237 on the remedy against oppression during a takeover and section 239 on the power to acquire shares of minority shareholders in a takeover. The amended successor provisions of the CA 2017 are yet to be tested by the Zambian courts.

Form of transaction

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

The claim will be independent of the nature of the concerned breach. The form of the transaction is therefore a secondary factor that does

not, in essence, affect the basis of the action. It is critical to ascertain whether the facts constituting the breach of the director are sufficient to disclose a plausible cause of action.

Negotiated or hostile transaction

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

The CA 2017 envisages both negotiated and hostile takeover transactions. Claims arising from negotiated transactions are the most common.

The most common claims in Zambia have been related to directors acting against the interests of the company regarding the undervaluation of shares for purposes of the property transfer tax. Other claims that are likely to arise relate to the non-disclosure of particular warranties and conditions that would impact the company after the sale on account of a director failing to exercise independent judgement. Lastly, claims may arise concerning conflicts of interest with regard to a lack of confidentiality on account of a director disclosing critical information discussed by the board relating to a merger or acquisition of third parties.

In the event of a breach of duty by a director, the directors can commence an action for breach of statutory duty or an illegal act. For the cause of action to succeed, the shareholders must demonstrate that there was negligence and breach of duty.

Section 335 of the CA 2017 allows a shareholder to bring an action against a director for breach of duty owed to the shareholder or former shareholder. Additionally, a shareholder may also bring an action against the company for breach of a duty owed by the company to the shareholder.

However with regard to a hostile takeover, which is recognised by section 132(4) of the CA 2017, a shareholder is given an additional right or cause of action to apply to the court within a period of 90 days from the date of the offer, for an order to either prevent the hostile takeover or compulsory acquisition of the shares, or apply for a variation of the class of the shares. In formulating the claim, the shareholder must demonstrate or disclose grounds on which the court should be moved to grant the order being sought with respect to the hostile takeover. In view of the fact that section 132(4) does not enumerate the grounds on which the claim by the shareholder should be based, it would suggest that the grounds of a claim in resisting a hostile takeover are much wider than the grounds that would ordinarily apply to a claim by a shareholder against a director for a mere breach of duty. The shareholder under section 132(4) is given more grounds to form the basis of a claim. This is because section 132(4) does not restrict the grounds for a claim to be brought for the breach of statutory duty by a director or shareholder alone. A breach of statutory duty may be raised on the basis that a shareholder alleges that in approving the offer, the director has breached his or her duties under the CA 2017 and is therefore not taking the best interests of the shareholder or the company into account.

Party suffering loss

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

The CA 2017 provides that an action may not be commenced by a shareholder to recover any loss arising from a reduction in the value of shares that he or she holds in a company by the failure of the shares to increase in value, by a loss suffered or by gains forgone by the company. However, a shareholder can commence a derivative action or petition for winding up.

A petition for winding up may be brought under the grounds to wind up a company by the court. The legal basis of this action is that the shareholder would be requesting that the court wind up the company on the basis that it is just and equitable to do so in view of the loss in the value of his or her shares. During the proceedings, which are commenced by way of petition, the burden of proof will be on the shareholder to prove that the loss is the result of a breach of statutory duty or negligence by the directors.

COLLECTIVE AND DERIVATION LITIGATION

Class or collective actions

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?

A class action by one or more interest groups is possible and may exist in relation to an action or proposal. A class action by a representative or more than one shareholder is permitted if the action is taken in relation to shareholders in the same class and not others or if a proposal expressly distinguishes between shareholders in a class.

The case of *Chanda Mutoni and Others v Bharti Airtel Zambia Holdings Bv, Celtel Zambia Plc* is a good example of a group shareholders' action. The critical issue is that of locus standi and that the shareholders are in similar circumstances. The Companies Act (Law No. 10 of 2017 (CA 2017)) makes express provisions for the definition of class and interest groups for the purposes of seeking court remedies by shareholders.

Derivative litigation

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 CA 2017 provides that a shareholder cannot bring a derivative action on behalf of a company unless with leave or the permission of the court. In determining whether or not to grant leave, the court will consider two factors. First, the court will have to be satisfied that the company or its subsidiaries do not intend to bring, diligently continue or defend, or discontinue the proceedings. Second, the court must be satisfied that it is in the interest of the company or its subsidiaries that the conduct of the proceedings should not be left to the boards of directors or to the determination of the shareholders as a whole.

In addition, the court, when it grants leave, may order that the shareholder take control of the conduct of the proceedings. The court can also require that the company or the board of directors provide information or assistance in relation to the proceedings.

The costs of the derivative actions may be borne by the company on the application of a director or shareholder or any person referred to in the CA 2017 as an entitled person.

INTERIM RELIEF AND EARLY DISMISSAL

Injunctive or other interim relief

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 granting an interim injunction, the courts in Zambia will consider the following benchmarks:

- whether the right to relief is clear and whether it is necessary to protect a shareholder against irreparable damage (inconvenience to a shareholder is not considered as a sufficient ground on which to grant an injunction);
- an injunction will not be granted to a shareholder when damages would be an alternative and adequate remedy to the injury

complained of, if the shareholder would succeed in his or her main action, such as derivative action or breach of statutory duty by a director;
- the shareholder must have a cause of action in law;
- whether the shareholder has a serious question to be tried; or
- whether the shareholders' main case has a real prospect of success.

Shareholders are at liberty to apply to the court for injunctive or other interim relief directing or prohibiting, cancelling or changing an M&A transaction or shareholder or board resolution. In addition to the principles of granting injunctions, the court will consider the following factors before it can grant a shareholder an injunction:
- whether the affairs of the company are being conducted or the powers of the directors are being exercised in a manner that is oppressive;
- whether an act or omission, or proposed act or omission, by or on behalf of the company has been done or is threatened to be done that was or is likely to be oppressive; or
- whether a resolution of the members, or any class of them, has been passed or is proposed that was or is likely to be oppressive.

Early dismissal of shareholder complaint

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

With respect to derivative actions that require leave of the court, the court may summarily dismiss a shareholder's case by refusing to grant leave under section 331 of the Companies Act (Law No. 10 of 2017 (CA 2017)). Other causes of actions by shareholders against a director for breach of statutory duty under section 335 of the CA 2017, may be determined summarily if the court finds that the shareholders' complaint or case fails to disclose a plausible cause of action. In this case, the other parties are at liberty to apply to the court for the disposal of the case on a point of law. An application of this nature to dispose of a matter without trial will be made before discovery. This also applies to actions for the protection of minority shareholders during a takeover made under the provisions (section 134 of the CA).

ADVISERS AND COUNTERPARTIES

Claims against third-party advisers

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. For a shareholder to bring a claim he or she must establish:
- that the third party owes the shareholder a duty of care;
- that the damage that has been suffered was foreseeable;
- that it was just and reasonable to impose a duty of care; and
- remoteness of damage.

In Zambia, there has been no case with respect to actions against third parties regarding M&A transactions. In light of the fact that there is an absence of case law, the Zambian courts rely on English principles of common law when presented with actions against third-party advisers, which apply pursuant to the English Law (Extent of Application) Act. Suffice to say that under common law it is quite difficult to establish a duty of care with respect to third parties. Common law has applied a very restrictive test on the opposition of duty of care on third parties.

Claims against counterparties

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

It is critical that a shareholder is able to demonstrate legal standing and establish a causal link to demonstrate that the damage he or she has suffered or incurred is directly or indirectly linked to the conduct of the counterparties to the shareholder. It all comes down to establishing whether there was a duty of care owed by the counterparties to the shareholder. The principle of remoteness of damage then becomes critical to determining counterparty liability.

LIMITATIONS ON CLAIMS

Limitations of liability in corporation's constitution documents

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 position is that directors are expected to comply with the articles of association, which are the only constituting documents of a company in Zambia as there is no longer a legal requirement for a memorandum of association. The articles of association can provide for more rigorous obligations than those provided for in the Companies Act (Law No. 10 of 2017 (CA 2017)). However, the articles cannot limit the duties of directors provided for in the CA 2017.

Statutory or regulatory limitations on claims

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 rule, the CA 2017 makes it clear that the shareholder's ability to bring claims by way of derivative action pursuant to section 331 against directors and officers is generally limited only to instances where the court has granted leave.

With respect to derivative actions that require leave of the court, the court may summarily dismiss a shareholder's case by refusing to grant leave under section 331 of the CA 2017. Other causes of actions by shareholders against a director, for breach of statutory duty under section 335 of the CA 2017, may be determined summarily if the court finds that the shareholders' complaint or case fails to disclose a plausible cause of action. In this case the other parties are at liberty to apply to the court for the disposal of the case on point of law. An application of this nature to dispose of a matter without trial will be made before discovery. This also applies to actions for the protection of minority shareholders during a takeover made under the provisions (section 134 of the CA).

The requirement for leave before a shareholder can make a claim against a director is an express limitation that is designed to give the court power to dismiss frivolous and vexatious shareholder claims.

With respect to shareholder claims under section 335, there is a limitation provided as to the extent that a claim may not be brought against a director by a shareholder to recover any loss arising from a reduction of the value of his or her shares for reasons related to a loss suffered or a gain foregone by the company.

Common law limitations on claims

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

Common law rules are applicable pursuant to the English Law (Extent of Application) Act. Common law is subservient to legislation; the provisions of the CA 2017 would naturally prevail against any common law principle that would prevent a shareholder from exercising his or her right to issue a claim against a director or a shareholder under section 331 and section 335 of the CA 2017.

The common law rule in *Foss v Harbottle* (1843) 67 ER 189 states that a shareholder cannot sue for wrongdoing to a company or complain of any internal irregularities, which is a potential impairment for a shareholder to bring an action against the directors or officers. The rule in the *Foss v Harbottle* principle is based on two factors: (1) the principle in *Solomon v Solomon* that a company is a legal entity separate from its shareholders; and (2) that the court will not interfere with the internal management of companies acting within their powers.

These common law principles have the potential to impede potential claims under sections 331 and 335 of the CA 2017.

STANDARD OF LIABILITY

General standard

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?

Directors ought to exercise reasonable care, skill and diligence in the execution of their duties. They are also required to use the experience, skills and knowledge that a reasonable person, fit to perform the duties of a director, would, at a minimum, be expected to use. The primary standard is the common law 'reasonable person' test.

Type of transaction

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

No.

Type of consideration

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

No.

Potential conflicts of interest

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 does not vary and is independent of whether a director has potential conflicts of interest in connection with an M&A transaction.

Controlling shareholders

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 rateably with all shareholders?

The applicable standard of care does not vary. It is the responsibility of the directors to safeguard the interests of the company as a whole and they cannot single out the interests of the controlling shareholder.

INDEMNITIES

Legal restrictions on indemnities

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 indemnities, the Companies Act (Law No. 10 of 2017 (CA 2017)) makes a distinction between the valid and invalid actions of an officer. With regard to invalid actions, the CA 2017 states that the officer will be held personally liable for any damage arising as a result of the officer's negligence, default or breach of duty. On the other hand, valid actions by an officer are fully indemnifiable by the company.

M&A CLAUSES AND TERMS

Challenges to particular terms

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

Shareholders in their personal capacity cannot challenge the terms of an M&A transaction. Nevertheless, if the transaction is not in the best interest of the company as a whole, a shareholder can raise a claim that the director is in breach of the fiduciary duties owed to the company pursuant to sections 106, 331 and 335 of the Companies Act (Law No. 10 of 2017).

PRE-LITIGATION TOOLS AND PROCEDURE IN M&A LITIGATION

Shareholder vote

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

Other causes of actions by shareholders against a director for breach of statutory duty under section 335 of the Companies Act (Law No. 10 of 2017 (CA 2017)), may be determined summarily if the court finds that the shareholders' complaint or case fails to disclose a plausible cause of action. In this case, the other parties are at liberty to apply to the court for the disposal of the case on a point of law. An application of this nature to dispose of a matter without trial will be made before discovery. This also applies to actions for the protection of minority shareholders during a takeover made under the provisions (section 134 of the CA).

As a general rule, the CA 2017 makes it clear that the shareholder's ability to bring claims by way of derivative action pursuant to section 331 against directors and officers is generally limited only to instances where the court has granted leave.

With respect to shareholder claims under section 335, there is a limitation provided as to the extent that a claim may not be brought against a director by shareholder to recover any loss arising from a reduction of the value of his or her shares for reasons related to a loss suffered or a gain foregone by the company.

Insurance

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

Insurance policies typically cover the directors and officers of a company for claims that are made directly against them that are not subject to an indemnity pursuant to section 122 of the CA 2017.

This extends only to valid bona fide actions by officers and directors.

Any reimbursement or indemnity paid to the directors and officers arising from a claim against them will be paid by the company. The ability to rely on an indemnity from the company is dependent on the nature of the claim.

Burden of proof

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 bears the burden of proof as is the case for any civil proceedings in Zambia. The burden does not shift in the course of proceedings. With regard to an allegation of fraud, a higher standard is required that is beyond the balance of probabilities.

Pre-litigation tools

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

Under section 278 of the CA 2017 a shareholder has the right to inspect the company's records. The CA 2017 specifically makes it mandatory that, as a matter of right, a shareholder is be permitted to inspect the following on request:

- the minutes of meetings and resolutions of members;
- copies of written communications to shareholders or to holders of a class of shares during the preceding five years, including annual reports, financial statements and group financial statements;
- beneficial ownership records;
- certificates given by directors;
- records relating to directors; and
- the interests register.

Pre-litigation discovery is not available in Zambia. The articles of association and shareholders' agreement may provide for a restriction of the information that may be made available to a shareholder, excluding the information listed in section 278 of the CA 2017.

Forum

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

The rule that determines the jurisdiction in which to commence M&A litigation is determined by the conflict of laws principle of *lex situs*. This means that the correct jurisdiction is the country in which the company is incorporated and the shares are registered.

Expedited proceedings and discovery

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 express provision for expedited proceedings. However, the High Court Commercial Division Rules provide for court-driven case management. The rules provide for penalties for parties that fail to comply with the court's order of directions with regard to the filing of pleadings and discovery within the described time frame. Using the Commercial Court Rules, a party can request for expedited compliance with the order for directions and subsequent setting down of the matter for trial.

The typical discovery that is conducted in Zambia is by way of exchange of a list of documents by the parties to the litigation. However, the procedural rules do provide for inspection. The typical issues that arise during discovery concern:

- the suppression or non-disclosure of the possession of documents;
- the custody of documents;
- the authentication of foreign documents;
- electronic evidence;
- the originality of documents; and
- due execution of documents.

DAMAGES AND SETTLEMENTS

Damages

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

Once the court has determined that a party is entitled to damages, the court refers the matter for the calculation of damages in a process known as the assessment of damages. The assessment is undertaken by an officer called a deputy registrar. The calculation of damages depends on the nature of damages awarded (ie, whether they are general damages, special damages, exemplary, punitive, aggravated or nominal damages). The calculation will generally be based on the value of shares, loss of business opportunity and interests.

Other factors include the financial performance of the company. The law imposes a duty to mitigate the damages by a claimant. Interest is generally awarded to preserve the time value of the shares.

Settlements

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

There are currently no special issues.

THIRD PARTIES

Third parties preventing transactions

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

In practice it is difficult for a third party to stop an M&A transaction. Attempts may be made to block the transaction through regulators. An attempt using regulators may succeed in slowing the transaction but it is highly unlikely to stop it.

Third parties supporting transactions

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

No.

UNSOLICITED OR UNWANTED PROPOSALS

Directors' duties

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 have a duty to act in the best interests of the company and, if it is established after evaluation that an M&A transaction would benefit the company, the Companies Act (Law No. 10 of 2017) compels the directors to act accordingly.

COUNTERPARTIES' CLAIMS

Common types of claim

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 mostly involves the breach of warranties and conditions, misrepresentation claims, fraud or deceit and negligence. Misrepresentations claims, whether fraudulent or negligent, are also likely between counterparties.

Differences from litigation brought by shareholders

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

The only major difference is that litigation brought by shareholders in the form of a derivative action requires leave of the court before a party can commence legal proceedings. Litigation involving parties to an M&A transaction does not require special leave of the court.

UPDATES AND TRENDS

Recent developments

36 What are the most current trends and developments in M&A litigation in your jurisdiction?

In broad terms, typical M&A litigation is not very common in Zambia. However, over the past few years there have been a number of cases relating to disputes of the valuation of shares for mandatory takeover offers for publicly traded companies. The cases of *Chanda Mutoni and Others v Bharti Airtel Zambia Holdings Bv, Celtel Zambia Plc* and *Reynolds Chanda Bowa v Puma Energy (Ireland) Holdings Limited* are examples. The Companies Act that came into effect in 2017, which now provides for clear and detailed relief for a shareholder to sue directors, is likely to generate a lot of litigation in future. The introduction of express provisions, which provide for the fiduciary duties of directors, will no doubt encourage shareholders to make directors more accountable in the discharge of their duties.

* *The information in this chapter is accurate as at February 2020.*

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