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M&A LITIGATION 2023

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Global overview

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The 2023 update of this publication reflects the ongoing development of M&A litigation that follows the wake of high levels of M&A transaction activity in the past few years. In many areas, M&A litigation has adapted and responded to the variety and scope of recent M&A transaction activity. For example, in the United States, one area where M&A litigation is beginning to develop is with respect to special purpose acquisition company transactions, a relatively recent phenomenon. Courts have begun to consider how traditional principles of M&A law apply to these new contexts, which often involve novel transaction structures and features.

Nonetheless, the core principles of M&A litigation have generally remained the same. M&A litigation continues to implicate substantive and institutional considerations. The main substantive considerations 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, and the process for adjudicating or intervening in M&A transactions. These substantive and institutional considerations provide vectors for understanding the comparative similarities and differences in M&A litigation across jurisdictions.

Substantively, jurisdictions in both common law and civil law systems share many similarities. Almost all jurisdictions impose duties upon directors and officers of the corporation to make decisions on an informed basis, free from conflict, and in the best interests of the corporation, broadly reflecting the duty of care and the duty of loyalty. Thus, directors and officers of corporations should act in accordance with these substantive standards regardless of jurisdiction. Most jurisdictions also place primacy on the shareholder franchise and thus 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.

Institutionally, there are also common themes across jurisdictions. These similarities concern the role of courts and other institutions in regulating M&A transactions. Across jurisdictions, courts generally share the view that their role is different for decisions that have been made on an informed basis, free from conflict, and in the best interests of the corporation, and decisions made by directors and officers whose interests may potentially conflict with the interests of the corporation with respect to a transaction.

For the former – decisions that were informed, free from conflict, and in the interests of the corporation—courts are generally reluctant to second-guess the decision by the directors and officers of the corporation. Sometimes, that deference is reflected through a default presumption in favour of the decision, which in the United States would be described as the business judgment rule. Sometimes, the deference is less explicit but exists as a matter of practice. Either way, directors and officers that make decisions on an informed basis, free from conflict, and in the interests of the corporation should expect courts in almost all jurisdictions to defer in some form to their decisions.

For the latter – decisions made by directors and officers with potential conflicts of interest – courts generally recognise the risks posed by potential conflicts of interest and will engage in closer scrutiny of the decisions made by the directors and officers. Again, this closer scrutiny may present in different forms, either as a heightened standard of judicial review, such as the entire fairness standard in the United States, or through heightened statutory or regulatory requirements tailored for such situations involving potential conflicts.

Despite these similarities across jurisdictions, the practices and processes for litigating M&A actions vary around the world. For example, the United States is comparatively permissive towards pretrial discovery in almost all types of civil litigation, including but not limited to M&A litigation. To offset this burden on defendants, US civil procedure is also generally permissive with respect to motions practice and provides opportunities for defendants to request dismissal of cases prior to discovery in all types of civil litigation. These kinds of pretrial processes are often not found in other jurisdictions, especially in civil law systems where pretrial discovery and motions practice is circumscribed. In addition, the United States has a comparatively permissive policy towards the class action mechanism, so a representative shareholder may assert claims on behalf of other similarly situated shareholders as part of a putative class, as long as the representative shareholder and the claims they assert meet certain requirements. Other jurisdictions, however, are not so permissive – they may not permit class actions for shareholder claims in connection with an M&A transaction, or even if they do, the class action mechanism may not, in practice, be the preferred vehicle for litigating M&A actions.

The following chapters present an overview of M&A litigation across jurisdictions. We trust that these chapters will serve as useful guidelines on the content and practice of M&A litigation around the world. 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.

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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

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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.

* *The information in this chapter was accurate as at 21 February 2022.*

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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 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 shareholders 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 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 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 a meeting or the voting form of the concerned resolution violate any law, administrative regulation or bylaw or the resolution itself violates the by-law.

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 or her 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 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 kinds 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 a tender offer, an agreed acquisition or other lawful ways.

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 claims, repurchase claims raised by the dissenting shareholders, claims to exercise preemptive rights and derivative damages 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?

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 a director's, senior officer's 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 is 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 refuses to act or fails 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 preservation (including property and behaviour 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 judgment 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 behaviour 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 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 confirming whether the amendment of deal terms is in compliance with the law. In other words, the courts do not have the discretion to make a 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 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 jurisdiction over 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; or
- 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 statements 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, chief financial officer, 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 association 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 refuses to act or fails to act within 30 days of 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 directors' 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 behaviour or decision comply 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 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 ordinarily prudent person when performing their duties.

In 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 the 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 transactions 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 for proving violations, causation, and 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 a violation of law, 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 the 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 a controlling shareholder's violation because PRC laws and administrative rules have special provisions regarding controlling shareholders, for example, the PRC laws require 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 the 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 against 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 153 of the Civil Code of the People's Republic of China (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 a 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 an 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 the Company Law of the People's Republic of China, 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 causes of actions.

A claim brought under the Company Law of the People's Republic of China 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 the Company Law of the People's Republic of China.

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 the 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:

- the place of domicile of the defendant;
- the place where the contract is performed or signed;
- the place of domicile of the plaintiff;
- the place where the subject matter is located; and
- 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 Arbitration Law of the People's Republic of China.

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 Civil Procedure Law of the People's Republic of China. However, where relevant documentary evidence is under exclusive control of one party, the other party may apply to the court to order 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 that 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 the 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 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 listed 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.

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 a 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 the Civil Code of the People's Republic of China will apply while litigation brought by shareholders usually alleges breaches of fiduciary duties by officers and directors to which the Company Law of the People's Republic of China and the Securities Law of the People's Republic of China 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.

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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 breaches of fiduciary duty by sellers' directors (for selling shares at a discounted price); buyers (for buying shares at a price higher than the fair value); and target companies (for accepting, and recommending shareholders accept, a tender offer, despite the tender offer price being lower than the fair value of the 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, a 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.

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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 a 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 directors' fiduciary duty, they may bring a direct claim against directors. The question arises as to whether shareholders can claim diminution of the 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 the diminution of the value of shares is 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.

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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 shareholder approval, if the consideration of the transaction is extremely

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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 reorganisations) is not generally considered a violation of the 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.

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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 the 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 the 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 a director's 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 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 shareholders hold the burden of proof in breach of fiduciary duty claims.

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 the privatisation 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 an 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 the 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.

In light of the recent increase in unsolicited offers, the Ministry of Economy, Trade and Industry established a study group in November 2022 to develop a code of conduct for relevant parties, including directors of target companies of unsolicited offers and competing offers. It aims to publish guidelines in early 2023.

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 past few years, none of the hostile takeover cases had escalated to court proceedings until recently. There have been four cases in 2021 and one in 2022 in which courts ruled on the validity of defensive measures taken in the face of a hostile takeover attempt. In each of these cases, the target company implemented a defensive plan that prescribed measures that must be followed by an offeror making an unsolicited offer, and it 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* and *Tokyo Kikai Seisakusho*), the court ultimately refused to grant injunctive relief, whereas, in the *Japan Asia Group* and *Mitsuboshi* cases, the court granted injunctive relief and hostile takeovers were 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.

In the *Mitsuboshi* case, despite the approval to issue stock acquisition rights by shareholders and while admitting the necessity of taking defensive measures to ensure sufficient information and time necessary for shareholders' informed decisions, the court granted the injunctive relief mainly because of the inappropriateness of stock acquisition rights' terms. In particular, the ambit of the collective actions which would trigger the issuance of the stock acquisition rights was ambiguously and broadly defined. Thus, the court determined that the acquirer would have difficulty in avoiding the issuance of the stock acquisition rights, and shareholders other than the acquirer who had voted for the issuance of the stock acquisition rights might have been prevented from making decisions free from concerns that they might be disqualified from the stock acquisition rights had they chosen to vote against their issuance.

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 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 the shareholders' prior approval. 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 a 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.

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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' claims may be classified according to grounds, capacity and reliefs. The grounds may include directors' breach of fiduciary duty, breach of contract and violations of shareholders' statutory rights. These actions can be commenced in various capacities. The shareholder may sue in a personal or representative capacity (in each case, as and for itself or other shareholders) or commence a derivative action (on behalf of the company). Various classes of reliefs such as damages, injunctions and orders to disclose information are available in each of these actions.

As to grounds, the possible grounds are numerous. Four groups of them are common enough to be mentioned briefly here.

First, both in equity and by statute, a director has a fiduciary duty to avoid conflicts of interest (including situations that confer unnecessary benefits or secret profits on such a director).

Second, it is common for shareholders to have contractual rights to challenge M&A transactions. For example, pre-emptive rights on transfer or issues of shares are often available by statute, in the articles of association, and in shareholders' or investment agreements.

Third, by statute, a company cannot either be dissolved and then merged into another company or sell over 50 per cent of its assets by value except with a supermajority vote of its shareholders by value.

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Fourth, a minority shareholder cannot be 'squeezed out' of a company in a tender offer situation except following a statutory procedure that includes, inter alia, the determination by a court of the fair value of their shares (section 147 of the Investments and Securities Act 2007).

Requirements for successful claims

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

The common requirement for every shareholder action is to establish shareholding: either via a share certificate issued by the company or by having its name entered in the register of members. Other factors will depend on the nature of the claim and the subject matter of the suit and must be considered on a claim-by-claim basis.

To recover compensation for breach of contract, the shareholder must show that he or she has suffered a financial loss as claimed. To obtain an equitable relief like an injunction, the claimant must show that damages will not be an adequate remedy and that it has not acted sluggishly or reprehensibly – in the traditional terminology, 'delay defeats equity' and 'he who comes to equity' must 'do equit' and 'come with clean hands'.

There are many other granular requirements that are relevant in each category of claim. For example, in 'squeeze out' situations, a complaining minority shareholder who seeks a higher price than that offered must show that he elected to transfer his or her shares to the offeror or demanded fair value for his or her shares, applied to the court within 20 days of the offeror's failure to pay a fair price to the dissenting shareholders, and he or she did not elect to accept the offeror's bid.

Beyond proof of shareholding, the basic elements of grounds to be established vary. For example, for a claim based on a contract, a valid contract and contractual terms must be proven.

Similarly, for claims based on fiduciary duty, the existence of a fiduciary duty must be shown and so must a breach or violation of that duty. Critically, only directors and employees owe fiduciary duties to the company. A majority shareholder does not, except to the extent that he or she is also a director or employee, owe a fiduciary duty to the company. However, promoters of a company stand in a fiduciary relationship with the company. Section 86 of the Companies and Allied Matters Act 2020.

Ordinarily, a shareholder cannot be compelled to sell or keep his or her shares simply because a majority of the other shareholders want him to sell or keep them, as the case may be.

There are 'squeeze out' provisions with detailed rules as to steps to be taken to complete a 'squeeze out' and for determining pricing, but they work only where at least 75 per cent of the shareholders by value, sometimes even 90 per cent, approve.

A shareholder commencing a derivative action must show that:

- a cause of action has arisen involving negligence, default, breach of duty or trust by a director or former director;
- the shareholder has given reasonable notice to the directors of his or her intention to sue;
- the directors do not bring, diligently prosecute, defend or discontinue the action;
- the shareholder is acting in good faith; and
- the suit is in the best interest of the company.

In a representative action, the shareholder must prove that he or she is a shareholder of the company, had indeed obtained the consent of the class of shareholders on whose behalf the action is commenced, and that those shareholders have a genuinely common interest.

In an action for unfair prejudice, the shareholder must show that the conduct or affairs of the company, an actual or proposed act or omission by or on behalf of the company, or a resolution or proposed shareholder resolution is either oppressive or unfairly prejudicial to, or unfairly discriminatory against the shareholder or shareholders, or disregards the interests of the shareholder or shareholders as a whole.

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. Certain claims are peculiar to publicly-traded companies, others are peculiar to privately-held companies and then there are claims that are common to both publicly-traded and privately-held companies. The vast majority of claims (eg, claims based on fiduciary duties, and claims seeking to challenge formal mergers and asset sales) are common to both publicly-traded and privately-held companies.

All of the statutory rules relating to tender offers are peculiar to publicly-traded companies. The statutory provisions on rights of pre-emption and the agreements following them apply mainly to privately-held companies.

Grounds that are based on contractual agreements (as distinct from statutes or fiduciary duties) are more often invoked in respect of private companies. But in principle, the rules also apply to public companies.

Form of transaction

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

Yes, but only as to the grounds for the claim, not as to litigant capacity or remedy. Capacities and remedies cut across grounds. As to the grounds, for example, all remedies relating to 'squeezing out' a dissenting minority in a listed company are confined to tender offers for listed companies, the 75 per cent minimum requirement for schemes of arrangement applies only to formal mergers, and the 75 per cent minimum requirement for sales of 50 per cent of assets is confined to asset sales.

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, but a financial loss is key only in respect of claims for compensation. One can only recover damages for financial loss suffered, except in the rare cases where punitive damages are available for egregious bad faith and oppressive conduct. Claims for declaratory orders or injunctions do not require proof of financial loss.

Where loss is relevant, it has to be the claimant who has suffered a loss. One cannot recover damages for the loss suffered by another except in derivative or representative actions. In derivative actions, the company needs to have suffered the loss. In representative actions, the 'represented' shareholders need to have suffered the loss.

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 actions are permissible but class actions are not. (Conceptually, the two are different: the former needs the consent of those who are to be represented, and the members of that category need to be ascertainable; the latter only requires a court order certifying the class and appointing a person or persons to sue on their behalf.)

Shareholder class actions are not provided for either by statute or by rules of court. Class actions are restricted to only cases concerning trademarks, copyright or patents and designs. See, for example, Order 9 Rule 4 of the Federal High Court (Civil Procedure) Rules 2019; and *Emenuwe v INEC et al* (2018) LPELR-46104(CA). Representative actions are provided for by statute. (Sections 46(4) and 344(1) of the Companies and Allied Matters Act 2020.)

In a representative action, the shareholder must prove that he or she is a member of the company, that he or she had indeed obtained the consent of the other shareholder to sue on their behalf (see section 46(4) of the Companies and Allied Matters Act 2020), and their entitlement to the corporate rights sought to be enforced by the representative action.

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. The shareholder may also intervene in pending litigation involving the company (see section 346(1) of the Companies and Allied Matters Act 2020). The leave of court must be sought and obtained. For the court to grant such leave, the court must be satisfied that:

- a cause of action has arisen from an actual or proposed act or omission involving negligence, default, breach of duty or trust by a director or a former director of the company;
- the shareholder has given reasonable notice to the directors of the company of his or her intention to sue;
- the directors of the company do not bring, diligently prosecute, defend or discontinue the action;
- the notice contains a factual basis for the claim and the actual or potential damage caused to the company;
- the shareholder is acting in good faith; and
- the action sought to be brought, prosecuted, defended or discontinued is in the best interest of the company.

See section 346(2) of the Companies and Allied Matters Act 2020.

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?

Our law recognises two classes of injunctive reliefs prior to closing: interim relief and interlocutory relief. The first is available ex parte, without notice to the other side. The other is available only with notice given to the other side. Ex parte interim reliefs are available only in cases where giving notice would in effect delay giving a remedy until it would be too late, and then only temporarily until a time, typically not more than two weeks, sufficient to give the other side notice of an application for interim or interlocutory relief.

Peculiar to interim reliefs are the points about the risk of injustice if some temporary relief is not given immediately. The other legal requirements common to both species of reliefs are as follows.

- Presence of a legal right to be protected.
- There is a serious issue of law to be tried in the suit, and the applicant has a real possibility, not a probability of success on the merits.
- The balance of convenience is on his or her side; that is, more justice will result in granting the application than in refusing it.

- Damages will not adequately compensate for the damage or injury if he or she succeeds at trial.
- The applicant's conduct is not reprehensible (eg, that he or she is not guilty of any delay or bad faith).
- He or she has given an undertaking as to damages. The seminal judicial authority is *Kotoye v CBN et al* (1989) 1 NWLR (Pt. 98) 419, which arose from a struggle between equity investors for the control of the corporation in issue.

Courts in Nigeria do not modify the terms of M&A transactions. Nigerian courts uphold the sanctity of contract to the effect that parties are bound by the contracts that they freely enter into, and courts do not modify or re-write contracts for parties. See *Arjay Ltd v AMS Ltd* (2003) LPELR-55 SC. However, courts may order the rectification of contracts, where appropriate, to make the words in the documents consistent with the true, common intentions of both parties. See *Tonimas (Nig.) Limited v Chigbu* (2020) 6 NWLR (Pt. 1720) 237.

Early dismissal of shareholder complaint

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

Yes, where only points of law are in issue and the facts are not in dispute such that witnesses are not required to be examined. For example, where the defence is based on a point of law as to jurisdiction or time-bar (section 251(1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended); and *Madukolu v Nkemdillim* (1962) 2 SCNLR 341), or where a key legal element that needs to be proved cannot be proved (such as where a mandatorily-required notice or regulatory approval in tender offers, is lacking). *INEC v Ogbadibo Local Government et al* (2015) LPELR-24839 (SC); and *Agip Nigeria Ltd v Agip Petroli International* (2010) 5 NWLR (Pt. 1187) 348.

Other methods for early dismissal or termination of a shareholder's complaint will depend on the type of claim. For representative claims, the defendant or the court may do so if it is in the interest of justice. For derivative claims, a challenge to the shareholder applicant's standing to sue may do so.

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 who have suffered loss can sue for the tort of conspiracy and in tort for negligent statements where sufficient 'privity' can be shown and there is no disclosure. However, these are limited options. Ordinarily, shareholders cannot sue in tort or in contract because there is rarely, if ever, a duty owed by such third parties to shareholders (as distinct from the company itself). The right to sue, if any, is typically in the hands of the company itself, not the shareholders. Except where the shareholders sue derivatively, they cannot sue the third parties directly.

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Shareholders can sue directly where they can prove direct loss. Where the shareholder has a derivative claim, the shareholder can sue as the company could have sued.

The shareholders can also incite professional disciplinary proceedings against third-party advisers who are subject to professional disciplinary regimes (eg, lawyers and accountants).

Claims against counterparties

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

Yes. Shareholders can sue counterparties of M&A transactions if they can prove loss or damages. Shareholders may also bring derivative suits against third parties where the directors fail to act in actions relating to:

- breach of contract;
- breach of warranties;
- misrepresentation or fraud (a misrepresentation is a false statement of a material fact made by one party which affects the decision of the other party in entering into the M&A transaction); and
- indemnity claims (which gives a party right to reimbursement in the event of a breach of warranties or other conditions in the contract).

Please see the cases below on the rights of shareholders to sue counterparties in M&A transactions:

- *Beluonwu v O K Isokariari Sons* (1994) 7 NWLR (Pt. 358) 587;
- *Bioku Inv Property Co Ltd v Light Machine Ind (Nig.) Ltd*. (1986) 5 NWLR (Pt. 39) 42;
- *Lagos State Govt v Toluwase* (2013) 1 NWLR (Pt. 1336) 555; and
- *A G, Lagos State v Purification Tech (Nig.) Ltd* (2003) 16 NWLR (Pt. 845) 1.

Claims for aiding and abetting breach of fiduciary duty are not yet a recognised cause of action maintainable by shareholders.

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?

Corporate constitutional documents and contracts cannot exempt directors from personal liability for bad faith conduct or breaches of fiduciary duty (see section 91(1) of the Companies and Allied Matters Act 2020). Beyond that, directors and officers are generally liable only to the extent that they have contracted to be liable or for fault-based tort as there is no rule of 'strict' no-fault liability for directors.

On matters involving special expertise, a director will not be liable for negligence unless he has held himself out as having special expertise on such matters. There is no presumption that on every given issue there is only one non-negligent course that a director may take. However, directors are required to exercise that degree of care, diligence and skill that a reasonable prudent director would exercise in comparable circumstances and may be liable for negligence and breach of duty where he or she fails to take reasonable care (see section 308 of the Companies and Allied Matters Act 2020). To that extent, directors can exercise their discretion.

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 most pervasive ability-limiting rules in issue are the rules on standing to sue and the rules recognising that directors typically have a range of options to choose from and can exercise their discretion.

As to standing, where the corporation has a right against its directors or other officers, the corporation is the one to sue to protect that right and not any shareholder. The shareholder can sue in the company's stead only where the statutory rules on derivative actions permit.

Strictly speaking, the constitutional documents of a corporation are binding as a contract among the corporation, its shareholders and its officers (see section 46 of the Companies and Allied Matters Act 2020). Thus, a shareholder can sue the directors directly for violating the constitutional documents. This dimension of the law is untested in practice and not as relevant as may appear at first sight. Shareholders can certainly, and in practice do, sue the corporation itself directly on the constitutional documents (so that they do not need to sue the directors separately and directly). Moreover, there is no precedent for recovering damages (as distinct from getting an injunction or declaration) in an action founded on constitutional documents alone.

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. General law rules limit the extent to which shareholders can sue officers and directors as much as they limit the extent to which shareholders can sue anyone else. For example, the usual statutory limitation rules apply to make claims time-barred after five or six years, depending on the limitation law of the state (Nigeria has 36 states and a Federal Capital Territory) where the cause of action in question arose.

Further, while the business judgment rule is not expressly applicable in our jurisdiction, directors continue to have the right to exercise their discretion, which cannot be fettered. Therefore, in principle, a director will not be held liable and cannot be proceeded against for exercising his discretion in good faith, with intent to further the interests of the company (see Section 305 of the Companies and Allied Matters Act 2020).

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 owe fiduciary duties to the company. Directors, in carrying out their duties and exercising their powers, are required to do so honestly, in good faith and in the best interest of the company; and shall exercise that degree of care, diligence and skill that a reasonably prudent director would exercise in comparable circumstances. (See section 308(1) of the Companies and Allied Matters Act 2020.) Thus, the directors must satisfy an objective standard when determining liability. A breach of this duty of care and skill is grounds for an action for negligence and breach of duty.

Executive and non-executive directors owe the same standard of care as directors in relation to the company. Officers of a company are liable to the company for any default, negligence or breach of trust in relation to the Company. See section 91(1) of the Companies and Allied Matters Act 2020.

Type of transaction

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

No. The standard does not vary based on the type of transaction.

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 based on the type of consideration 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?

No. The standard does not vary if the director or other officer has a potential conflict of interest in connection with an M&A transaction.

The law requires directors to avoid conflicts of interest. Directors are also prohibited from making secret profits from transactions to which the company is a party. A director who has a conflict of interest must make full disclosure of the conflict of interest, and recuse himself or herself from participating in meetings to discuss the matter in issue or from voting on a decision on it. Where the director discloses his or her personal interest in a transaction before the transaction is consummated or the secret profit is made, he or she may escape liability. However, if the disclosure is made afterwards, the director will be liable to disgorge the profits and the transaction may be unwound.

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 in this case.

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. Generally, the company may indemnify, or advance legal fees to its officers or directors in litigation arising from an M&A transaction. However, this will not apply where the director has acted fraudulently or is sued in a personal capacity for breaches of duty or crimes committed in the course of an M&A transaction. It is immaterial whether those breaches were purportedly committed to advance the interests of the company. (Section 91(2)(b) of the Companies and Allied Matters Act 2020.)

M&A CLAUSES AND TERMS

Challenges to particular terms

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

A shareholder can challenge a clause that tends to preclude third-party bidders only where that shareholder has both standing and grounds for challenging the clause.

As to standing, the shareholder will need either privity of contract (eg, as a shareholder seeking to resist a violation of the Memorandum and Articles of Association) or an independent cause of action (eg, the tort of conspiracy). Otherwise, the shareholder must be able in law to pursue a derivative action and then stand in the place of the corporation as the party contracting and sue as such.

As to the grounds, the existence or application of the clause will need to have breached either a statutory provision, a fiduciary duty (such as the rules against conflicts of interest), a contract, or a right protected under the law of tort.

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?

Except in instances where a contract (eg, shareholders agreement) or the articles may contain veto provisions requiring shareholder vote on litigation, shareholders are typically not required to vote on litigation by the company. That power usually lies with the directors. Where a shareholder votes in favour of an M&A transaction, that vote will exonerate the company from liability for failure to obtain shareholder consent (where shareholder consent is required for the M&A transaction).

Statutory processes, such as a scheme of arrangement or merger, which may be used in M&A transactions, require the sanction of the Federal High Court. Shareholder votes carrying the requisite majority approving the scheme are required to bring an action in court to sanction the scheme.

Insurance

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

Directors' and officers' liability insurance protects directors and officers from liability arising from M&A transactions where the directors have not acted fraudulently.

Insurance is permissible in law for directors and officers and is usually provided for them in corporations that are larger or take corporate governance conventions seriously. The extent to which insurance influences shareholder litigation in M&A contexts is unclear. In our experience, insurance is not a major factor in determining how such litigation is framed or conducted, or in assessing its outcome or likelihood of success.

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 in an M&A litigation lies with the claimant. The general rule is that the person who makes a claim is the one who has to prove it. Thus, the shareholder or company suing an officer or director will bear the burden of proving the elements of its claim against the officers and directors.

Pre-litigation tools

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

Yes, there are pre-litigation tools available, but for two reasons they are not as significant as they may appear to be at first sight.

First, shareholders have no right to inspect all the books of the company. They may inspect registers of shareholders and directors and minutes of general meetings, for example, but they have no right to inspect minutes of directors' meetings. (Sections 112(1)-(2) and 219(1) of the Companies and Allied Matters Act 2020.) The lack of access to minutes of directors' meetings is understandable, as otherwise there would be little confidentiality attached to sensitive information reviewed at such meetings.

Second, the civil procedure rules have always allowed pre-trial discovery. We have seen that these rules are not critically relevant in the real world. (See Order 43 of the Federal High Court (Civil Procedure) Rules, 2019; and Order 29 of the Lagos State High Court (Civil Procedure) Rules 2019.)

Forum

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

Yes. Where the subject matter of the dispute relates to the affairs of companies, such matters should be instituted at the Federal High Court. (See section 251(1)(d) of the Constitution of the Federal Republic of Nigeria 1999 (as Amended); and *NDIC v Okem Ent* (2004) 10 NWLR (Pt. 880) 107.)

The Investments and Securities Tribunal, established under section 274 of the Investments and Securities Act 2007, has exclusive original jurisdiction in all cases between the Securities and Exchange Commission and an investor or issuer of securities.

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?

Expedited proceedings are possible under general civil procedure rules that provide for accelerated hearings in deserving cases. (See Order 12 of the Federal High Court (Civil Procedure) Rules 2019.) The rules for accelerated hearings are invoked in M&A litigation as often as they are in other kinds of litigation.

Nigerian courts' civil procedure rules allow discovery in M&A litigation as in other litigation. (See Order 43 of the Federal High Court (Civil Procedure) Rules, 2019 and Order 29 of the Lagos State High Court (Civil Procedure) Rules 2019.) In practice, the rules are rarely invoked or tested in any kind of litigation. Other rules of civil procedure insist that documents to be relied on by a claimant in litigation must be 'front-loaded' along with the pleadings when the pleadings are filed.

This means that the defendant will ordinarily see all the important documents well before the trial of witnesses begins and that there is less need for discovery than would otherwise be the case.

In any event, the prevailing practice is for the courts to resist 'fishing expeditions', so that counsel frequently does not seek discovery. Thus, the almost complete absence of discovery in Nigerian M&A litigation is less of a problem in practice than it could otherwise have been.

Moreover, where the points in issue are points of law rather than fact, there will be no need for a trial. Procedures that do not call for a trial (eg, 'originating summons', 'summary judgment' or 'judgment based on admission') may then be adopted to minimise the delay.

DAMAGES AND SETTLEMENTS

Damages

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

As in the rest of Nigerian law, damages in M&A litigation may be general, special or punitive, and may extend to recovering expenses and losses of profits as long as the claimant will not in effect get compensated twice for the same head of loss.

General damages are fairly nominal. Special damages are awarded only for loss actually proved, such as expenditure made and wasted or the loss of profits that would have been made had the violation of the law in issue not occurred. The most basic rule of quantifying damages throughout Nigerian and other common law jurisdictions is that a claimant can insist on being put in the position in which it would have been if there had been no breach.

Punitive damages are awarded only in very rare instances where there is egregious bad faith or 'oppressive' conduct on the part of the defendant. The rules on quantifying punitive damages are not well developed. The usual common law rules as to mitigation and remoteness of damage apply.

Settlements

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

Two points are noteworthy. First, a settlement typically has two dimensions, and each of these involves a different set of consequences: a court judgment, breaches of which are sanctionable with an attachment of assets, fines and imprisonment; and a contract between the parties, sanctionable by awards of damages and injunctions. The parties are at liberty to pursue either set of sanctions or both.

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, they can, but such third parties will need to establish grounds for doing so under the general law. The most obvious instances here would be the third party had earlier entered into an M&A contract with the company (such that entering into a later M&A contract would in effect amount to committing the economic tort of inducing a breach of contract) and a third party has rights to veto or approve of the transaction (eg, a private equity investor has 'drag along' rights or is a lender), and the company seeks to ignore 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?

Generally, in the absence of contractual nexus or other specific grounds to base such action, third parties cannot use litigation to pressurise corporations to enter into M&A transactions. However, it is possible for third parties to use litigation to pressurise corporations to enter into M&A transactions. For example, where there are rival bidders, one of them can instigate a third party to sue its rival or threaten to sue the directors of the company for fraud if they should fail to cause the company to enter into an M&A transaction. Regulators are known in effect to force parties to enter into M&A transactions by threatening either not to give requisite approval or to intervene directly in the affairs of one of the parties who may be financially vulnerable.

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?

Where the proposal is made to the company, the directors have fiduciary duties to consider the proposal and make a determination as to whether the proposed M&A transaction is in the best interest of the company; advise the company and the shareholders on the desirability of the proposal; and where, the transaction requires shareholder consent, put the proposal before the shareholders for their approval. Further, directors will be responsible for procuring third-party advisers and solicitors to assist with a review of the proposal and provide sundry services with regard to the proposed M&A transaction.

Where the proposal is made to the shareholders, the directors have statutory duties to act as administrators of the process, and to some extent, form an opinion about it and advise 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?

The more topical types of claims by shareholders include claims for breaches of the memorandum and articles of association and shareholders agreements; violations of the statutory procedure for the M&A process in issue; and for higher valuations of shares in publicly-traded companies than the offeror is offering for the time being.

As to claims by the parties to the M&A deals themselves, claims for breaches of contract, especially representations and warranties, come to mind more readily than other 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 key differences are the grounds and timing. For example, grounds such as breaches of the M&A deal documentation are available only to deal parties themselves while breaches of pre-existing shareholder agreements are available only to the shareholders. As to timing, a shareholder who is not a party has little control over the timing of the deal and is therefore more likely to want to act quickly before it may be too late to act. A party to a deal may have little such pressure as he or she will ordinarily know that the M&A deal cannot close without it and will often have the right to seek indemnities or enforce warranties even after closing.

UPDATES AND TRENDS

Recent developments

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

Applications filed in bad faith seeking injunctions have long been a key concern for all M&A transactions, especially with publicly-held targets. Further, applications for higher valuations of shares in 'squeeze out' situations are a growing concern.

The covid-19 pandemic has created challenges and engineered innovations in justice delivery. Courts now make provisions for electronic hearings of suits and electronic filing of court processes. Again, the requirement for the physical presence of witnesses in court may be waived allowing courts to take the examination of witnesses abroad with the aid of audio-visual technology.

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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 1967 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 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?

(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 4 rule 6 of the Rules of Court 2021 (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 a 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 appear 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 9 rule 16 of the Rules of Court if they can show that:

- the claim discloses no reasonable cause of action or defence;
- the claim is an abuse of process of the Court; or
- it is in the interests of justice to do so.

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 and decided under the previous Order 18 rule 19 of the Rules of Court 2014].

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 a company that sues a 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 in 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?

A 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 interest. Further, if the company is listed on SGX, the Listing Manual provides for the disclosure of an interested person transaction. A publicly 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:

- The liability of the officer in paying a fine in criminal proceedings or a penalty incurred in respect of non-compliance with any requirement of a regulatory nature.
- 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 a loan must be repaid according to the terms set out in 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 a general meeting.

In the course of an M&A, the directors may issue shares of a company. However, the directors cannot do so without the 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 in 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 shareholder 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.

Singapore civil procedure also provides for pre-action discovery.

Common discovery issues would arise in relation to access to documents such as 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 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 are 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.

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:

- 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.
- 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:

- 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.

- 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.
- 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.
- 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 occurs 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.

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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 main types of claims shareholders can bring in connection with M&A transactions in Korea are claims for damages against the directors for breach of their fiduciary duty and claims to contest the validity of the M&A transactions, including challenges based on non-compliance with relevant procedures. The type of action varies depending on whether the shareholders bring an action before or after the closing of an M&A transaction. Prior to closing, the shareholders may seek injunctive measures to prohibit the transaction, and after the closing, the shareholders may seek damages or contest the validity of the transaction.

Under article 401 of the Korean Commercial Act, a director becomes liable to pay damages to third parties, including the shareholders of the company, if the director neglects to perform his or her duties intentionally or through gross negligence. However, under this article, a shareholder may only seek damages in connection with the loss he or she directly suffered. It does not cover losses indirectly suffered by the shareholder as a result of the losses inflicted on the company. Where a director's action (or inaction) causes losses to a company, a shareholder may file a representative lawsuit in accordance with article 403 of the Korean Commercial Act.

Where there is a merger, split or business transfer, a company is required to comply with the relevant procedures set forth in the Korean Commercial Act, including obtaining a special resolution of the general meeting of shareholders. If a shareholder learns that the company violated the Korean Commercial Act in connection with a procedure for merger, split or business transfer, the shareholder may, on the basis of procedural violation, file a preliminary injunction seeking the suspension of the transaction in advance or file a lawsuit after the company completes the transaction to assert the nullity of the merger, split or business transfer. In addition, the shareholders that had opposed the merger or business transfer (ie, dissenting shareholders) can demand the company to purchase their shares, after which the company becomes obliged to purchase them.

Requirements for successful claims

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

Injunctive measures

Where a shareholder files a claim to seek relief in the form of a preliminary injunction, the shareholder needs to demonstrate that the company has violated the relevant procedures under the Korean Commercial Act and its articles of incorporation and the shareholders will suffer irreparable harm as a result of the violation. Generally, the shareholders file this claim based on article 402 of the Korean Commercial Act, which provides the shareholders with the right to seek an injunction. However, article 402 only allows a shareholder with 1 per cent or more of the total number of issued and outstanding shares of the company to exercise the right to an injunction.

Nullification of the merger

Under article 529 of the Korean Commercial Act, a lawsuit to nullify the merger must be filed within six months of registering the merger. A shareholder may bring an action for nullification on the basis of a procedural violation in connection with conducting the merger or a grossly unfair merger ratio.

Damages for the breach of fiduciary duties

When filing a lawsuit to seek damages against the directors' breach of fiduciary duties under article 401 of the Korean Commercial Act, the shareholder needs to prove the director's intent or gross negligence, a causal relationship between the occurrence of loss and the directors' intent or gross negligence and a specific amount of damages.

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 shareholders' claims do not differ on the basis of whether the corporations involved in the M&A transaction are publicly traded or privately held.

Form of transaction

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

The types of claims may vary depending on the form of the transaction. Generally, for all types of transactions, a shareholder is able to seek damages against a director's breach of his or her fiduciary duty.

If the claim involves a transaction of a special form, a shareholder may be able to raise a special type of claim.

- In the event of a merger or split, a shareholder may seek to nullify the transaction on the basis that it had been conducted in violation of the relevant procedures. This action can only be brought by a lawsuit within six months of registering the merger or split.
- With respect to tender offers, a shareholder may sue for damages against the company for false or misleading information contained in the disclosure documents, which caused harm to the shareholders.
- Share purchase claims generally involve shareholders that are party to the transaction, alleging a breach of representations 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. The types of claims do not differ between a negotiated transaction and a hostile offer. Usually, a hostile M&A occurs through appointing a new director at a shareholders' meeting by way of purchasing shares or obtaining proxy votes from the shareholders. In this process, if the directors of the company violated their fiduciary duty, which, in effect, inflicted losses upon the shareholders, the shareholders may claim damages against the directors.

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. If a company suffers losses, a shareholder may bring a representative lawsuit against the company's directors in accordance with the relevant procedures. To do so, the shareholder will need to show that the directors intentionally or negligently violated the laws, regulations or articles of incorporation or breached his or her fiduciary duty, which resulted in the losses at issue.

If the shareholders have suffered losses in connection with an M&A transaction, they may seek a claim for direct damages against the company or its management, or both, in accordance with the tort law in Korea.

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?

Generally, class or collective actions are not permitted in Korea. The only exceptions are securities class actions brought under the Securities Class Action Act, which requires a court's permission before filing. However, this exception is only available in limited cases, including share purchasers' filing of a claim for damages against a publicly traded company for making false disclosures that they had relied upon in purchasing the shares.

In September 2020, the Korean Ministry of Justice announced a bill for the Class Action Act, which is designed to expand the use of class actions generally across all industries. The legislative purpose of the Class Action Act Bill is to efficiently prevent and provide relief in connection with the damages collectively suffered by a large group of people since, with the development of modern society, the possibility of a group suffering collective losses increased in various sectors.

The main aspects of the Class Action Act Bill can be summarised as follows:

- class actions will be allowed for any type of civil litigation and the court will grant class certification if there are 50 or more plaintiffs;
- the legislation will apply retrospectively to certain acts 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 with respect to class actions, along with increased penalties for breaching document production orders;
- the parties will be unable to challenge the court's class certification; and
- the class action will be tried before a jury unless the court decides otherwise or the plaintiff representative raises an objection to this process.

Since the National Assembly has not passed the Bill yet, the Class Action Act has not yet been enacted.

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 shareholders may file a lawsuit known as a 'representative lawsuit' against the directors of the company. A representative lawsuit may be filed by a shareholder holding 1 per cent or more of the total number of the issued and outstanding shares of the company, or in the case of a listed company, by a shareholder that maintained the holding of 0.01 per cent or more of the total number of issued and outstanding shares of the listed company for six or more months prior to filing the representative lawsuit. If the combined shares held by a few shareholders meet the above requirements, they may file a representative lawsuit together.

A representative lawsuit may also be filed by a shareholder who holds 1 per cent or more of the total number of issued and outstanding shares of the parent company, or in the case of a listed company, by a shareholder who has maintained the holding of 0.5 per cent or more of the total number of issued and outstanding shares of the listed company (the parent company) for six or more months prior to the filing.

If the shareholders request the company to take action to seek liabilities against the directors but the company does not file a lawsuit within 30 days from the receipt of such request, the shareholders may file a representative lawsuit against the directors 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?

Korean courts may issue an injunctive relief to prevent the closing of an M&A transaction if the procedures or substance of the M&A transaction violate the laws, regulations or articles of incorporation. While courts may order the prohibition of certain procedural acts in connection with the M&A transaction, they may not modify or alter the terms and conditions of the transaction.

However, in order for the court to issue an injunctive relief before completing the transaction, the applicant for the injunction will need to prove that there exists the 'right subject to preservation' (ie, a private right of action to seek the suspension of procedure) and a need for preservation (ie, the possible occurrence of irreparable harm if the transaction is carried out).

Early dismissal of shareholder complaint

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

This question is not applicable to Korean jurisdiction since there is no disclosure or discovery process in Korean litigation.

ADVISERS AND COUNTERPARTIES

Claims against third-party advisers

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

If the shareholders are parties to the M&A transaction, they certainly have the right to claim damages against third-party advisers. However, if the shareholders are not parties to the M&A transaction, they have no right to directly seek damages against third-party advisers.

If the company is a party to the M&A transaction, the shareholders have to right to ask the directors to seek damages against third-party advisers. If the company suffered a loss as a result of third-party advisers' actions, but the directors of the company do not file a claim for damages against them, the shareholders may file a representative lawsuit against the relevant directors.

Claims against counterparties

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

The shareholders may claim damages against the counterparties to M&A transactions only where it can be established that the company and the counterparties have jointly committed an illegal act. However, the shareholders will have the right to claim damages only if they suffered damages directly in connection with the M&A transaction at issue. If the company is a party to the M&A transaction and it suffers losses, the shareholders may request the directors of the company to file a claim for damages against the counterparties, and only if the directors refuse to do so, the shareholders may file a lawsuit against the directors to seek damages.

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 Article 400(2) of the Korean Commercial Act, a company may, in its constituting documents, include monetary limits to liabilities imposed on directors for their negligent breach of director duties. Generally, the limitation on the penalty amount will be six times the most recent annual compensation (including incentives and benefits from the exercise of stock options) provided to the director prior to the date of the alleged breach. It will be three times for outside directors. These limitations do not apply to intentional or reckless breaches that caused a company to suffer losses, violations of a director's non-compete duty (prohibition against the usurpation of the company's opportunities and assets), and violations of the prohibition against self-dealing.

With respect to article 400(2) of the Korean Commercial Act, the Supreme Court of Korea held that courts may exercise reasonable discretion regarding the limitations on the liability of the directors in consideration of the circumstances surrounding the breach of fiduciary duty. The relevant factors for consideration include the substance of the acts constituting the breach and the underlying motives for the breach (Supreme Court Judgment 2021Da279347 dated 12 May 2022).

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?

If the directors' erroneous decisions regarding an M&A transaction result in losses to the company, the shareholders may file a representative lawsuit against the directors of the company. However, a representative lawsuit under the Korean Commercial Act may be filed by a shareholder who holds 1 per cent or more of the total number of the issued and outstanding shares of the company or, in the case of a listed company, by a shareholder that has maintained holding of shares that account for 0.01 per cent or more of the total number of issued and outstanding shares of the listed company for six or more months prior to filing the representative lawsuit.

In the event that the shareholding ratio of the shareholder(s) is reduced to less than 1 per cent after they filed the representative lawsuit, there will be no impact on the proceedings. However, after filing the lawsuit, the shareholders may not withdraw the lawsuit, or waive, accept or settle the claims subject to the lawsuit without the court's permission.

It will suffice for the plaintiff to be in the position of a shareholder when filing the representative lawsuit. It is not necessary for the plaintiff to have been in the position of a shareholder at the time of the event that led to the finding of the directors' liability. In other words, the 'contemporaneous ownership rule' required under US laws does not apply under Korean laws.

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?

Generally, the business judgment rule applies in Korea. An executive or director will not be found liable for a business decision if the decision was:

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

Specifically, in Supreme Court Judgment 2006Da33333 dated 11 October 2007 and Supreme Court Judgment 2007Da35787 dated 14 January 2010, the Supreme Court of Korea held, in civil cases concerning claiming damages against a director, that:

> *[If] a director has undertaken a procedure to sufficiently collect, investigate, and review necessary information to the extent reasonably available regarding the foreseeable advantages and disadvantages to the company (in relation to the transaction at issue), and then, on such basis, made a business decision in the best interest of the company with reason, confidence and good faith, and the particulars of such decision are not significantly unreasonable and within the range of reasonable decision of an ordinary director, even if the company suffers losses due to the decision, the director's decision is considered to be within the discretion permitted to the director in exercising management judgement, and therefore, the director cannot be held liable for damages to the company.*

The above cases clarify that the business judgment rule applies to determining whether a director breached his or her fiduciary duty.

In other words, Korean courts generally uphold the management's business decisions. It is difficult for shareholders to bring successful claims against directors or executives since the courts tend to uphold their 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?

A director or executive may be held liable to the shareholders if there was a breach of fiduciary duty by the director in connection with an M&A transaction. For example, if a director approves a merger with an affiliated company for the benefit of the ultimate controlling shareholder of the group to which the company belongs, but where the merger itself is harmful to the company, then the director may be found to be in breach of his or her fiduciary duty.

The business judgment rule applies when considering a director's duties owed to the company. To determine whether a director's decisions regarding an M&A transaction should be upheld under the business judgment rule, the standards established by the Supreme Court precedents (Supreme Court Judgment 2006Da33333 dated 11 October 2007 and Supreme Court Judgment 2007Da35787 dated 14 January 2010) should be satisfied. Put simply, if a decision was made in good faith without the pursuit of the directors' personal interests, based on the information collected to the extent available, and based on the belief that the decision is in the best interest of the company, the director will not be held liable to the company for damages resulting from the losses caused by the decision.

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?

If a director or officer seeks to have the company engage in a transaction in which he or she is interested, the director or officer is required under the Korean Commercial Act to disclose material facts relating to his or her interest to the board of directors and obtain approval by two-thirds or more of the total number of directors prior to entering into the transaction. The transaction must be fair and at arm's length in terms of its particulars and the agreed procedures. It is the prevailing view that this provision applies to M&A transactions.

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?

If a controlling shareholder seeks to have the company engage in a transaction in which he or she is interested, the controlling shareholder is required under the Korean Commercial Act to disclose material facts relating to his or her interest to the board of directors and obtain approval by two-thirds or more of the total number of directors prior to entering into the transaction. The transaction must be fair and at arm's length in terms of its particulars and the agreed 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?

The Supreme Court of Korea held that, in principle, a company could disburse legal fees as part of the company's expense only when the company is the party to the litigation.

Accordingly, the legal fees incurred in connection with a civil or criminal case to which a representative of the company is a party cannot be disbursed at the company's expense. One of the exceptions to this rule is where an individual, a representative of the company, becomes the party to the litigation due to legal requirements, but the company is the actual stakeholder in the dispute. Other examples include where the dispute had arisen in the course of a legitimate performance of his or her duties as the representative for the benefit of the company or carrying out duties that are mandatory as a person in the position of a representative. These examples concern legal disputes related to the company's business, and in light of all circumstances at the time, it was considered necessary for the representative to carry out the litigation or respond to lawsuits for the company's benefit. In such cases, the legal fee may be disbursed as part of the company's expense (Supreme Court Judgment 2004Do6280 dated 26 October 2006 and Supreme Court Judgment 2012Do8274 dated 10 July 2014).

M&A CLAUSES AND TERMS

Challenges to particular terms

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

Shareholders may bring a claim against the directors for their breach of fiduciary duty if the particular clauses or terms in the M&A transaction are in violation of the directors' fiduciary duty owed to the company. However, the termination fees, standstills, 'no shop' or 'no talk' clauses have rarely been challenged on the grounds of a director's breach of fiduciary duty until now.

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?

Unless there are special circumstances, such as that the vote at the general shareholders' meeting was conducted illegally, the vote at the general shareholders' meeting generally does not directly affect M&A litigation.

Insurance

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

There are many cases where the shareholders file a claim for damages against the directors in the form of a representative lawsuit, alleging that the company has suffered losses due to the directors' erroneous decision-making in respect of M&A transactions. In various M&A litigations, directors' and officers' insurance covers the directors' liabilities for damages.

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 an M&A litigation, where the shareholders claim liability against the directors, the shareholders need to prove that the directors are at fault and their fault caused losses to the company. This is because, generally speaking, the burden of proof concerning a claim for damages lies on the party asserting the existence of the claim. There are legal provisions and precedents that allow the shifting of the burden of proof, but these apply only in exceptional cases, and such instances are rare in M&A litigation.

Pre-litigation tools

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

Prior to filing a lawsuit against the management, the shareholders may obtain internal information about the company in the following ways.

The shareholders may request the company to allow them to access, during business hours, or make copies of the minutes of the board of directors. The company may refuse the request on the grounds that the shareholders' request is unjust, but in such case, the shareholders may inspect or copy the minutes of the board of directors meeting after obtaining an order from the court (article 391-3 of the Korean Commercial Act).

The shareholders may request the company to allow their access to or make copies of the articles of incorporation, minutes of the general meeting of shareholders, the list of shareholders, and the bond register of the company during business hours (article 396 of the Korean Commercial Act). If the company does not respond to the shareholders' requests, the shareholders may access and make copies of the above documents by making applications with the court, including an application for a provisional injunction.

A shareholder holding 3 per cent or more shares of the company may request the company, by filing a written request with relevant reasons, to allow access to or make copies of the account books and related documents of the company (article 466 of the Korean Commercial Act). However, if the company is a listed company, the shareholders that maintained their shareholding of 0.1 per cent or more in the preceding six months may make the above request (article 542-6 (4) of the Korean Commercial Act). If the company is a listed company with a capital of more than 100 billion Korean won, the shareholders that maintained their shareholding of 0.05 per cent or more in the preceding six months may make the above request (article 542-6 (4) of the Korean Commercial Act). If the company does not respond to the shareholders' request, the shareholders may access and make copies of the above documents by making applications with the court, including an application for a provisional injunction.

Forum

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

In principle, the litigation between the parties regarding agreements, such as share purchase agreements or shareholding agreements, is required to be submitted to the jurisdiction as set forth in the relevant agreements. If there are no such agreements in place or the party to the litigation has no relation to such agreements, the litigation proceedings will generally take place at a district court having jurisdiction over the address of the defendant (which can be a company or a natural person).

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?

In Korean civil litigations, the discovery procedure has never been introduced. However, a party to civil litigation may file a request to the court to seek the production of certain documents against its counterparties or a third party in possession of the relevant documents (article 344 of the Korea Civil Procedure Act). If the counterparty fails to produce the documents despite receiving the relevant court order, the court may draw adverse inferences and accept the arguments made by the party regarding the requested documents without the documents (article 349 of the Korea Civil Procedure Act).

On the other hand, there is a procedure akin to discovery in Korean criminal proceedings. The defendant or its legal counsel may request access to and copies of the documents held by the prosecutor. In fact, in cases concerning the directors' breach of duties in relation to M&A, the prosecutor usually confiscates a significant amount of data from the company, advisers, and related persons and stores them. As such, the request for access to and copies of the documents is almost essential. If the prosecutor refuses the defendant's access to or making copies of documents, the defendant or its legal counsel may file a request with the court to access and make copies of the materials in possession of the prosecutor (article 266-4 of the Korea Criminal Procedure Act).

No proceedings have been introduced in Korea yet that are similar to expedited proceedings, irrespective of whether the case is civil or criminal litigation.

DAMAGES AND SETTLEMENTS

Damages

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

In many M&A litigations, the agreements at issue, including M&A contracts, prescribe the method of calculating damages in advance. In such cases, the damages shall be calculated in accordance with the respective agreements.

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However, if no such agreement exists, ordinary damages are calculated based on the difference between the positions the parties would have been at but for the unlawful act and the current position of the parties after the occurrence of the unlawful act.

Any special damages beyond ordinary damages may be imposed only if the party (usually the company or its directors) responsible for paying the damages has known or could have known the possibility of such losses.

In Korea, punitive damages are not recognised except where there is a special provision in the law. Currently, the relevant laws on M&A transactions do not provide for punitive damages.

Settlements

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

In general, in civil proceedings, it is possible for the plaintiff and the defendant to voluntarily enter into a settlement or reach a settlement by following the court's mediation procedures or recommendation for settlement. It is possible to settle M&A litigation in the same way under certain circumstances. However, it is not common for parties to M&A litigation to settle. In particular, entering into a settlement is not permitted in cases where the conclusion of a lawsuit is to have an impact not only on the parties involved but also on third parties, including a lawsuit to nullify the resolution of the general meeting of shareholders or a lawsuit to nullify the issuance of new shares.

THIRD PARTIES

Third parties preventing transactions

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

Shareholders, directors, auditors, liquidators, bankruptcy trustees or creditors who are not in charge of approving the merger/split have the right to file a lawsuit seeking nullification of a merger or split pursuant to articles 529 or 530-11 of the Korean Commercial Act. In addition, shareholders and other parties may apply for a provisional injunction to suspend the merger or split procedure on the basis of the above right.

A labour union has no right to apply for a provisional injunction to suspend the merger process unless there is a special circumstance, but if the labour union has signed a separate agreement with the company on the procedure or timing to promote M&A transactions, the labour union may rely on the agreement to apply for a provisional injunction in order to suspend the merger procedure.

On the other hand, a third party, such as other interested financial or strategic buyers, may suspend the M&A transaction only in special circumstances, including cases where it is established that the M&A transaction is in violation of the Monopoly Regulation and Fair Trade Act of Korea or in breach of the contract (including a letter of intent or a memorandum of understanding) that they have entered into with the company.

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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 for a third party to force the company to pursue M&A transactions through litigation.

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 are required to comply with the matters set forth in the articles of incorporation, and as a delegate of the company, the directors should handle authorized matters in good faith. Therefore, even if there is an unsolicited M&A proposal, the directors will have to determine whether entering into the M&A transaction is in the best interest of the company on the basis of necessary information collected and reviewed to the extent reasonably possible.

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 lawsuits involving M&A transactions are civil proceedings concerning the alleged breach of representations and warranties. Share purchasers frequently file lawsuits to seek a partial return of the purchase price that has already been paid or to claim damages against the seller on the basis of the breach of the seller's representations and warranties. There has been much controversy over whether to allow sandbagging in litigations relating to representation and warranties in the past. This controversy was resolved as the Supreme Court of Korea accepted sandbagging for the first time in a case in which we acted as counsel.

Differences from litigation brought by shareholders

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

While many lawsuits between the parties involve damages claims based on their contracts, many lawsuits filed by shareholders involve seeking damages on the basis of the breach of the director's fiduciary duty.

UPDATES AND TRENDS

Recent developments

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

Most current trends in M&A litigation are as follows.

There were cases where the performance of the M&A contract had been disrupted after execution due to covid-19. In such cases, there are disputes as to whether the seller or the purchaser is attributable to the disruption.

There are increasing numbers of dissenting shareholders that take actions beyond exercising their voting rights against the M&A transaction at the general meeting of the shareholders to oppose the transaction. They exercise their claims for stock purchase against the company and seek a determination of the relevant share purchase price from the court.

Recently, the counterparties to or the interested parties of M&A transactions show a tendency to resort to the use of criminal litigations. In particular, there are many issues relating to the valuation of shares, and in such cases, the parties involved file criminal complaints with the prosecutors to pressure the other side. For example, they raise a claim that the representative director of the purchaser manipulated the price of the put option in collusion with an accounting firm, or that the directors unfaithfully calculated the merger ratio without proper valuation of the shares in the course of pursuing the merger. These complaints, in fact, lead to the prosecutors' indictment.

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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 Securities Exchange Act, shareholders must prove that the proxy statement contained a material misrepresentation or omission that induced shareholders to authorise the transaction (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 A.3d 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 A.3d 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

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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 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 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. However, a hostile bidder (a shareholder) may 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 the 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 A.2d 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 arm's-length negotiations do 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. Some states also allow corporations to extend these exculpatory provisions to direct claims against certain officers of the corporation. However, these provisions do not eliminate liability for directors or officers 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 on 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 A.2d 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: 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 A.3d 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' (*Id*).

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 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 an entire fairness review to the board's decision. Under an 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 fulfils 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 A.3d 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 A.2d 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 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 A.2d 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 A.3d 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 the 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, the 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?

Courts have recently considered the application of traditional fiduciary duty requirements to a special purpose acquisition company (SPAC) business combinations. SPACs are blank cheque entities that list on a public exchange with the purpose of acquiring a private company, a process that takes the private company public through a reverse merger (de-SPAC) rather than a traditional initial public offering process. If a SPAC sponsor exercises control over the SPAC or a majority of the board of directors is not independent, the sponsor or the board may have potential conflicts of interest in connection with the de-SPAC transaction, which may result in a fairness review of the transaction. In certain situations, where the SPAC stockholders have voting interests that are 'decoupled' from their economic interests, some courts have found that a stockholder vote on the de-SPAC transaction may not have an effect on the court's standard of review.

However, recent decisions affirm that defendants can prevail on an entire fairness review. In transactions involving a controlling shareholder with a potential conflict of interest (and without the procedural safeguards that would result in the business judgment rule), courts have determined at trial that the transaction satisfied the entire fairness standard, even if there were defects in the deal process. Factors that may be relevant to whether a transaction was the product of fair dealing, despite an imperfect process, including the timing of the transaction, the structure of the transaction, and how the transaction was negotiated and the reasons why the board approved the transaction.

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