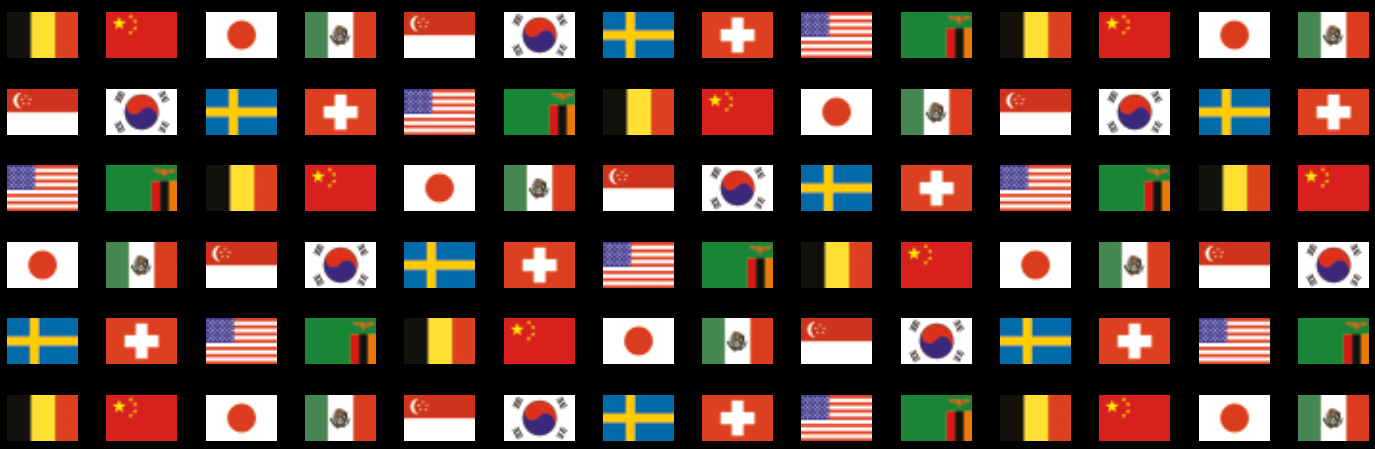
M&A LITIGATION 2022

Contributing editors
Matthew Solum and Stefan Atkinson



LEXOLOGY
Getting the Deal Through

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
Claire Bagnall
claire.bagnall@lbresearch.com

Head of business development
Adam Sargent
adam.sargent@gettingthedealthrough.com

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

Lexology Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting the Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Matthew Solum and Stefan Atkinson of Kirkland & Ellis LLP, for their continued assistance with this volume.

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Getting the Deal Through

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Switzerland

Harold Frey and Dominique Müller

Lenz & Staehelin

TYPES OF SHAREHOLDERS' CLAIMS

Main claims

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

The main claims that shareholders may assert against corporations, officers and directors under Swiss law in connection with M&A transactions are the following:

- challenges of shareholder resolutions and of certain board resolutions;
- liability claims against officers, directors, founders, auditors or any person involved in a merger, demerger, capital increase, conversion of legal form or transfer of assets, or the review thereof; and
- claims for the review and determination of adequate compensation by a court.

These claims are available under the Swiss Merger Act (MA) and Swiss corporate law as set forth in the Swiss Code of Obligations.

Requirements for successful claims

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

Challenge actions against shareholder or certain board resolutions require the plaintiff shareholder to show that the resolutions violate the corporation's articles of association, provisions or principles of Swiss corporate law or provisions of the MA (board resolutions can in principle be challenged only in the latter case). It is further required that the challenged resolutions affect the plaintiff shareholder's legal position and that he or she did not approve the resolutions. Challenge actions must be directed against the corporation and filed within two months of the adoption of the resolution (in the case of a challenge under Swiss corporate law) or of the publication of the resolution (in the case of a challenge under the MA), respectively, after which the respective claims will be forfeited.

Liability claims against officers, directors, founders or auditors or any person involved in a merger, demerger, capital increase, conversion or transfer of assets, or the review thereof, require the plaintiff shareholder to show that the defendant intentionally or negligently breached a legal duty under Swiss corporate law or the MA; that such breach caused loss or damage to the corporation or corporations involved or to the plaintiff shareholder; and that there is an adequate causal nexus between the breach of duty and this loss or damage. Whether the plaintiff shareholder must also establish fault of the defendant or whether fault is presumed (and the defendant must prove he or she was not at fault to escape liability) depends on the specific claims in question and is controversial. The claims prescribe five years (from 1 January 2023, three years) after the date on which the person suffering damage learned of the damage and of the person liable for it, but in any event 10 years after the date on which the harmful conduct took place or ceased.

Claims for review and determination of adequate compensation by the court in the context of a merger, demerger or conversion of legal form require the plaintiff shareholder to show that his or her shares or membership rights are not adequately safeguarded, or that the compensation offered is not adequate. These claims must be filed within two months of the publication of the merger, demerger or conversion resolution, after which the respective claims will be forfeited.

Publicly traded or privately held corporations

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

No. Under Swiss law, the types of claims shareholders can assert do not depend upon whether the corporations involved in the M&A transaction are publicly traded or privately held. However, in the case of public tender offers, the stock exchange law and regulations apply, and shareholders may resort to the competent authorities in the case of violations of these provisions.

Form of transaction

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

Yes. Challenges against shareholder or board resolutions under the MA may only be brought in the case of mergers, demergers or conversions of legal form. In the case of other transaction forms, shareholder resolutions may only be challenged under general Swiss corporate law. Liability claims under the MA are only available in the case of mergers, demergers, conversions of legal form or transfers of assets. In the context of other transactions, liability claims against officers and directors, founders or auditors must be brought under general Swiss corporate law. Claims for review and determination of adequate compensation by the court are only available in the case of mergers, demergers or conversions of legal form.

Negotiated or hostile transaction

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

No. Under Swiss law, the types of claims do not differ depending on whether the transaction involves a negotiated transaction versus a hostile or unsolicited offer.

Party suffering loss

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

No, but this has an impact on who has standing to bring a liability claim. If a loss is suffered by the corporation, liability claims may be brought both by the corporation itself or by individual shareholders. Shareholders can sue either on behalf of the corporation (derivative suit) or in their own right. However, a shareholder who decides to bring an action in his or her own right will be limited to claiming damages directly suffered by that shareholder.

As regards challenges to shareholder resolutions under the MA or requests for review and determination of adequate compensation by the court, only shareholders have standing to bring these claims.

COLLECTIVE AND DERIVATION LITIGATION

Class or collective actions

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

For the time being, Swiss procedural law does not provide for class actions. Therefore, a shareholder may only pursue claims on his or her own behalf. The limited options for collective proceedings before Swiss courts are through a joinder of parties. Pursuant to the Swiss Code of Civil Procedure (CCP), parties may join their claims and appear jointly in a trial when their case is based on similar factual circumstances or legal grounds. While the concept of joinder may have some advantages for plaintiffs who wish to coordinate their actions (eg, only one evidentiary proceeding, reduced costs and avoidance of conflicting judgments), it is not particularly suited for litigation involving large groups of plaintiffs, as it lacks many of the features and advantages of (common-law types of) class actions. For example, the rules relating to the joinder of parties do not provide for mandatory joint representation. Further, while the CCP does provide for the possibility to bring all the joined claims in the jurisdiction of one single court, this rule does not establish mandatory and exclusive jurisdiction for all claims that are based on the same facts.

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

Derivative litigation

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

Yes, loss suffered by the corporation in connection with an M&A transaction may be claimed by individual shareholders in a derivative action. This action is not brought in the name of the company but in the name of the individual shareholder. However, the plaintiff shareholder may only request the payment of damages on account of the corporation (not the plaintiff shareholder) to compensate for the loss suffered by the corporation.

INTERIM RELIEF AND EARLY DISMISSAL

Injunctive or other interim relief

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

In the case of urgency, Swiss courts may order injunctive or interim relief in summary proceedings upon a prima facie showing that a right of the plaintiff has been violated or is about to be violated (eg, by a shareholder resolution that violates principles or provisions of corporate law or the corporation's articles of association, or both), and that this violation will cause the plaintiff irreparable harm. In these proceedings, the court further assesses whether the relief requested by the plaintiff is reasonable and the harm caused to the defendant if this relief was granted is proportionate (balance of the equities). On this basis, a Swiss court may prevent the closing of or enjoin an M&A transaction. In the case of utmost urgency (which is not caused by the plaintiff's delay in applying for injunctive or interim relief), the court may also grant this relief ex parte, subject to confirmation in inter partes proceedings. Any interim or injunctive relief granted by a court must be pursued by the plaintiff in ordinary proceedings to have a court confirm the right of the plaintiff and the violation thereof.

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

Under the Swiss Merger Act, upon application by a plaintiff shareholder, a Swiss court may review if the shareholders' membership rights are adequately safeguarded in the context of a merger, demerger or conversion of legal form, and may determine adequate compensation. In that sense, a Swiss court may modify deal terms. However, this action does not enjoin the M&A transaction or prevent its closing. Moreover, adequate compensation is not determined on an injunctive or interim relief basis but in ordinary inter partes proceedings.

Early dismissal of shareholder complaint

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

No. First of all, Swiss procedural law does not provide for discovery, and it allows only limited disclosure in the context of the court's taking of evidence. There are no specific procedural remedies for parties to seek an early or summary dismissal of claims. However, the court may decide to dismiss claims without the taking of evidence (or ruling on requests for document production) if it finds that the plaintiff failed to state its case or to sufficiently substantiate a claim, or if the court is persuaded based on the available documentary evidence that it may dismiss (or grant) the claims without a need to take further evidence.

In any event, a Swiss court would not proceed with a case if the basic procedural requirements of an action (legitimate interest in the action, jurisdiction, no lis pendens of the same action, no res judicata, capacity to sue, payment of advance on court costs, etc.) are not met by the plaintiff at the outset of the litigation. In that case, the court would not even enter the merits of the case but would rather dismiss the claims on procedural grounds.

ADVISERS AND COUNTERPARTIES

Claims against third-party advisers

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

In principle, claims against third-party advisers that assist in M&A transactions may only be brought by the parties contracting the services of these third-party advisers; that is, typically the corporations that are assisted by the advisers. However, to the extent that third-party advisers are involved in the review of a merger, demerger or conversion of legal form as specifically required under the Swiss Merger Act (MA), they may become liable both to the involved corporations and to the shareholders for damage or loss caused by the intentional or negligent breach of their duties. A corporation's auditors who are involved in auditing the annual and consolidated financial statements, the formation of the corporation and a capital increase or reduction of capital are subject to a similar liability.

Claims against counterparties

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

In principle, no. Shareholders may bring claims only against officers, directors, founders or auditors of the corporation in which they hold shares. However, to the extent persons involved in a merger, demerger, conversion or transfer of assets, or the review thereof, breach duties under the MA that aim at protecting the shareholders of all corporations involved in such transaction, they may be held liable by the shareholders of each of the involved corporations. Moreover, if a counterparty's involvement in the breach of a fiduciary duty by an officer or director of a corporation was of such significance that the counterparty de facto assumed and exercised the role of the officer or director, such counterparty could be held liable by the corporation's shareholders as a de facto officer or director.

LIMITATIONS ON CLAIMS

Limitations of liability in corporation's constitution documents

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

The articles of association determine a corporation's purpose and may specify the scope of a board member's or executive's duties. For instance, the articles of association may authorise the board of directors to delegate the management of all or part of the company's business to individual members or third parties in accordance with organisational regulations. Such delegation has the effect of limiting the liability of the non-executive members of the board of directors. Therefore, the articles of association may have an impact on the extent board members or executives can be held liable. However, the articles of association may not validly limit the extent of liability of board members or executives.

A limitation of liability can rather result from a release or waiver of liability claims that may be granted by shareholder resolution. Moreover, under Swiss law, a corporation may agree on a contractual basis to indemnify its board members or executives against liability claims brought by third parties, provided these claims do not stem from a grossly negligent or intentional breach of duties.

Statutory or regulatory limitations on claims

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

For Swiss corporations, it is a standard agenda item of the annual general shareholders' meeting to resolve whether to release directors and officers from liability. Pursuant to general Swiss corporate law, a release resolution adopted by the general shareholders' meeting provides directors and officers with a legal defence against a liability action brought by the corporation or by shareholders that consented to the release resolution, to the extent that the liability action is based on facts that were known to the shareholders when adopting the release resolution. This release resolution further limits the non-consenting shareholders' ability to bring liability claims, as the right to bring an action of these shareholders is forfeited six months (from 1 January 2023, 12 months) after the resolution of release has been adopted.

In the context of M&A transactions, if the general shareholders' meeting approves a merger or demerger contract or a conversion plan, respectively, this shareholder resolution is generally deemed to have the same effect with respect to the transaction as a release resolution. Therefore, shareholder resolutions approving certain M&A transactions provide the directors and officers with a legal defence against liability claims brought by the corporation or consenting shareholders in the context of this transaction, provided the facts on which these liability claims are based were properly disclosed and, thus, known (or at least easily recognisable) to the shareholders when adopting the resolution.

Common law limitations on claims

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

Switzerland's legal system is based on civil law, not common law. However, during the past decade, the Swiss Federal Supreme Court has recognised a business judgment rule concept pursuant to which Swiss courts should exercise restraint in reviewing business decisions from an ex post perspective, provided these decisions are the result of a proper decision-making process on the basis of sufficient information and free from conflicts of interest. If these requirements are met, Swiss courts may only review whether the business decision was reasonable and must not review whether the decision was correct in substance. However, as the Swiss Federal Supreme Court emphasised, this concept of judicial restraint applies in principle only to business decisions but not to decisions taken by the board of directors in the exercise of its statutory duties.

STANDARD OF LIABILITY

General standard

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

Whether a board member or executive is in breach of his or her duties is determined pursuant to the specific duties in the context of an M&A transaction as set forth in the Swiss Merger Act and pursuant to the general duty of care and loyalty under Swiss corporate law: that is, the duty to apply due diligence and to safeguard the interests of the company in good faith. The standard of care is objective: a Swiss court will assess whether the board member or executive applied the level of care a reasonable person in the position of this board member or

executive would be expected to apply in a similar situation. Any failure to meet this standard triggers liability. Even minimal negligence is, in principle, sufficient; in practice, however, the level of negligence (along with other factors, including the application of the business judgment rule) will typically have an impact on the court's determination as to whether a board member or executive is liable.

Type of transaction

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

No. In principle, the standard does not vary depending on the type of transaction at issue. However, a Swiss court would assess the specific transaction situation at hand when determining the level of care expected from a board member or executive in the particular situation.

Type of consideration

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

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

Potential conflicts of interest

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

While the standard does not vary, in the case of conflicts of interest, the Swiss law concept of the business judgment rule does not apply, and Swiss courts may, in principle, fully review whether a business decision taken under the influence of a conflict of interest was correct in substance. While a conflict of interest may be a breach of duty in and of itself, this is not necessarily the case and does not trigger liability automatically. However, according to precedent by the Swiss Federal Supreme Court, where a conflict of interest is established, there is a factual presumption that the board member or executive acted in breach of his or her duties by taking a business decision under the influence of this conflict. This presumption may be rebutted by showing that the corporation's interests were safeguarded despite the conflict of interest.

Controlling shareholders

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

While the standard does not vary, a Swiss court would assess the specific transaction at hand when determining the level of care expected from board members or executives in this situation. In the case of public tender offers, Swiss stock exchange law generally prevents a controlling shareholder from receiving consideration that is not shared proportionally with all shareholders.

INDEMNITIES

Legal restrictions on indemnities

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

It is the majority view in legal doctrine that, under Swiss law, a company may advance the legal fees of its officers and directors named as defendants, at least in the case where a liability action is brought by third parties (shareholders). Provided the defendants did not act intentionally or grossly negligently, it is further accepted that the company bears the legal fees of or indemnifies the defendants, respectively. Moreover, it is undisputed and general practice for public and large non-public Swiss companies to contract and pay for directors' and officers' insurance for the benefit of its directors and officers.

M&A CLAUSES AND TERMS

Challenges to particular terms

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

In public transactions, the extent to which corporations may agree on certain clauses or terms (offer conditions, break-fees, etc) is limited, and the competent authorities under Swiss stock exchange law review whether a tender offer respects these limits. A shareholder who wishes to challenge this clause may thus apply to these authorities and argue that the clause was in violation of the stock exchange law and regulations.

Outside of the scope of the stock exchange law and regulations, shareholders may only challenge the resolutions of the general shareholders' meeting, and in certain instances also resolutions of the board of directors, that approve a merger, demerger or conversion of legal form, but not individual clauses in M&A transaction documents.

PRE-LITIGATION TOOLS AND PROCEDURE IN M&A LITIGATION

Shareholder vote

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

The vote of shareholders in an M&A transaction, or the approval thereof, respectively, generally strengthens the board's position in M&A litigation. A shareholder resolution approving a merger, demerger or conversion of legal form is in principle deemed to have the same effect as a release of liability with respect to this transaction, and provides the board members and officers with a legal defence against liability claims. At the same time, the challenge of shareholder resolutions in the context of M&A transactions is often the primary means for individual shareholders to challenge the M&A transaction as such and to prevent it from closing.

Insurance

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

At least in the case of public or larger private Swiss corporations that regularly contract and pay for directors' and officers' insurance, this insurance plays an important role in liability actions brought by shareholders against directors or officers (including those arising from M&A transactions).

Burden of proof

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

In the case of liability actions against board members or officers, the plaintiff shareholder bears the burden of proof to establish that the defendant breached a legal duty under Swiss corporate law or the Swiss Merger Act (MA); that this breach caused loss or damage to the

corporations involved or to the plaintiff shareholder; and that there is an adequate causal nexus between the breach of duty and this loss or damage. It depends on the specific claim, and it is controversial whether the plaintiff shareholder must also establish the fault of the defendant or whether fault is presumed (in which case the defendant must prove that he or she was not at fault to escape liability).

In the case of challenge actions against resolutions adopted by the shareholders or (under the MA) against resolutions adopted by the board, it is generally the plaintiff shareholder who bears the burden of proof that the challenged resolution was in breach of provisions or principles of Swiss corporate law, the MA, or the corporation's articles of association.

Pre-litigation tools

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

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

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

Under the current regulation (which remains in force until the end of 2022, a shareholder may only inspect the company's accounts or business correspondence upon express authorisation by a shareholder or board resolution, and if the appropriate measures are taken to protect the corporation's business secrets. If the board refuses to provide the requested information without just cause, the shareholder may apply to a court, which may order the corporation to provide the requested information.

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

Moreover, any shareholder may request that the general shareholders' meeting has specific company matters investigated by means of a special audit when this is necessary to properly exercise the shareholders' rights. The main purpose of this special audit is, in fact, to investigate potential liability claims against board members or executives and to enable shareholders to decide on whether to bring these claims. The right to request a special audit presupposes that the shareholder has exercised his or her statutory right to information and inspection (see above). If the general shareholders' meeting approves the special audit, the corporation or any shareholder may apply to a court within 30 days to appoint an independent special auditor.

If the general meeting does not approve the special audit, under the current rules (which remain in force until the end of 2022) shareholders who together represent at least 10 per cent of the share capital or hold shares with a nominal value of 2 million Swiss francs may apply to a court within three months to appoint an independent special auditor.

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

Such shareholders are entitled to such audit despite the general meeting's refusal if they can establish prima facie that directors or officers of the corporation have violated their duties and caused damage or loss to the corporation or the shareholders.

Forum

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

Under Swiss law, both in a domestic and an international context, challenges against shareholder resolutions must be brought at the seat of the corporation. Subject to certain limitations or additional requirements in cases where the defendant resides in a member state of the Lugano Convention, liability actions against directors or officers may either be brought at the seat of the corporation or at the individual defendant's domicile.

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

Expedited proceedings and discovery

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

Discovery is not available under Swiss procedural law.

In M&A litigation, expedited (summary) proceedings are applicable in the case of requests for interim or injunctive relief. If an M&A dispute is subject to arbitration, expedited arbitration proceedings may be available depending on the arbitration clause or the procedural rules agreed upon by the parties (eg, by reference to the rules of an arbitration institution, such as the International Chamber of Commerce or the Swiss Chambers' Arbitration Institution).

DAMAGES AND SETTLEMENTS

Damages

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

As for any damage calculation under Swiss law, including in M&A litigation, damage is defined as the difference between the injured party's actual assets and the injured party's hypothetical assets absent the

breach of duty that caused damage or loss to the injured party. The injured party bears the burden to substantiate and prove the damage or loss with a high level of detail. If it is not reasonably possible to quantify the damage or loss, a Swiss court may estimate the quantum at its discretion in light of the normal course of events. However, in general, Swiss courts are reluctant to exercise this discretion to estimate the damage or loss, and would do so only if the plaintiff showed that he or she had exhausted all available means to substantiate and prove the damage or loss. While state courts apply very strict, sometimes exaggerated standards regarding the burden of substantiation and proof (and are more inclined to dismiss claims if these standards are not met), arbitral tribunals are often more generous (and also more flexible when it comes to the application of certain valuation methods, eg, for the calculating of future loss of profits). Damages may only be claimed as compensatory, consequential or incidental damages. However, Swiss law does not allow claims for punitive damages.

Settlements

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

In the case of a challenge against shareholder resolutions, the defendant corporation (which is represented by its board of directors unless the challenge is brought by the board) may not enter into a settlement agreement with the plaintiff shareholder as the board lacks the power to modify shareholder resolutions. Therefore, this settlement would require shareholder approval. However, settlement agreements under which the plaintiff shareholder withdraws the challenge are permissible. Moreover, it is permissible to settle liability claims (in the case of a liability action brought by the corporation, the representatives of the corporation must ensure that a settlement is in the best interest of the company as otherwise they may face liability).

THIRD PARTIES

Third parties preventing transactions

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

Unless the third party has specific contractual arrangements with the sellers or the target company (eg, an exclusivity agreement), there is, in principle, no legal basis under Swiss law for litigation to break up or stop agreed M&A transactions prior to closing. However, to the extent that a third party is a shareholder to a corporation involved in an M&A transaction, it may challenge shareholder resolutions that are required in this context and cause a transaction to fail through this litigation.

Third parties supporting transactions

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

Unless the third party has a specific contractual arrangement with the corporation or shareholders under which they are obliged to enter into a certain M&A transaction (and specific performance of this undertaking is practically feasible), litigation is generally not available for this purpose. Shareholders who are dissatisfied with a board's reluctance to enter into M&A transactions may, however, raise pressure, for example by exercising their statutory information and inspection rights, by challenging shareholder resolutions or by threatening to bring liability claims in the case of continued inaction. However, except in extraordinary circumstances, it would be difficult for shareholders to hold directors or officers liable for not having entered into M&A transactions.

UNSOLICITED OR UNWANTED PROPOSALS

Directors' duties

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

In the case of an unsolicited or unwanted proposal to enter into an M&A transaction, the board of directors must perform its duties with due diligence and must safeguard the interests of the corporation in good faith. The board is further required to afford equal treatment to all shareholders in similar circumstances.

In the case of a public tender offer, pursuant to the stock exchange law and regulations, the board is obliged to publish a complete and accurate report in which the board comments on the tender offer. Moreover, from the moment in time the tender offer becomes public, the board may not enter into transactions that would have a significant impact on the corporation's assets or liabilities.

COUNTERPARTIES' CLAIMS

Common types of claim

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

The most common types of claims asserted by parties to M&A transactions under Swiss law are claims for breaches of representations and warranties and claims for price adjustments or earn-out payments. All of these claims are typically brought post-closing. To a lesser extent, parties to M&A transactions under Swiss law bring:

- claims to enforce exclusivity or confidentiality agreements;
- damages or break-fee claims in relation to aborted negotiations;
- claims to compel the signing or the closing of an M&A transaction; and
- claims arising from a breach of covenants on the target company's conduct of business between the signing and closing.

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

Differences from litigation brought by shareholders

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

Disputes arising between the parties to an M&A transaction are often resolved through arbitration, which has become the method of choice for dispute resolution in international M&A transactions. Most parties and M&A practitioners perceive arbitration as a commercially effective means to resolve M&A disputes and prefer it over state court proceedings. The main advantages of arbitration over state court litigation are:

- the possibility to select a neutral forum and to prevent home bias;
- to appoint arbitrators who are experienced in M&A disputes;
- confidentiality of the dispute resolution process; and
- the flexibility to tailor arbitration proceedings to the specific disputes that may arise in an M&A transaction.

In contrast, a challenge of a shareholders' resolution or liability claims brought by plaintiff shareholders in the context of M&A transactions under Swiss law are almost exclusively litigated in front of state courts,

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

UPDATES AND TRENDS

Recent developments

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

Post-closing disputes between parties to an M&A transaction agreement over breaches of representations and warranties or price adjustments claims are fairly common in Switzerland. As a result of the covid-19 pandemic, pre-closing disputes, in particular in relation to conditions precedent to closing (eg, absence of a material adverse change) or covenants on the conduct of business between signing and closing, have become somewhat more frequent during the past two years. M&A litigation between the parties to an M&A transaction is often resolved through arbitration, in particular in international M&A transactions. While the number of disputes between the parties to an M&A transaction has increased during the past decade, there is no clear trend as regards the frequency or the type of disputes arising out of M&A transactions.

In contrast, in recent years, Switzerland has seen an increasing number of cases of high-profile litigation in the context of unfriendly takeovers and proxy fights. This litigation often involves multiple proceedings, such as requests for injunctive or interim relief in advance of general shareholders' meetings, challenges actions against shareholder resolutions and liability actions against directors and officers of the corporations involved. Unlike M&A disputes between the transacting parties, to date, these cases are almost exclusively litigated in state courts and often draw significant public attention. Among the most prominent cases of this M&A litigation during the past few years are the attempted takeover of Sika AG by Compagnie de Saint-Gobain, the proxy fights regarding Sunrise Communications AG and Schmolz + Bickenbach AG (now Swiss Steel Holding AG).

LENZ & STAEHELIN

Harold Frey
harold.frey@lenzstaehelin.com

Dominique Müller
dominique.mueller@lenzstaehelin.com

Brandschenkestrasse 24
8027 Zurich
Switzerland
Tel: +41 58 450 80 00
Fax: +41 58 450 80 01

Route de Chêne 30
1211 Geneva 6
Switzerland
Tel: +41 58 450 70 00
Fax: +41 58 450 70 01

Avenue de Rhodanie 40C
1007 Lausanne
Switzerland
Tel: +41 58 450 70 00
Fax: +41 58 450 70 01

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