

M&A Litigation 2019

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



Publisher

Tom Barnes

tom.barnes@lbresearch.com

Subscriptions

Claire Bagnall

claire.bagnall@lbresearch.com

Senior business development managers

Adam Sargent

adam.sargent@gettingthedealthrough.com

Dan White

dan.white@gettingthedealthrough.com

Published by

Law Business Research Ltd

87 Lancaster Road

London, W11 1QQ, UK

Tel: +44 20 3780 4147

Fax: +44 20 7229 6910

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First published 2018

Second edition

ISBN 978-1-83862-120-9

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



M&A Litigation

2019

Contributing editors**William M Regan, Jon M Talotta and Ryan M Philp****Hogan Lovells US LLP**

Lexology Getting The Deal Through is delighted to publish the second 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. Our coverage this year includes new chapters on Australia, Austria and China.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

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, William M Regan, Jon M Talotta and Ryan M Philp of Hogan Lovells US LLP, for their continued assistance with this volume.



London
May 2019

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This article was first published in June 2019
For further information please contact editorial@gettingthedealthrough.com

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India

Naresh Thacker and Bhavin Gada

Economic Laws Practice

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

Oppression, mismanagement and prejudicial conduct

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

Class or derivative actions

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

Breaches of contract

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

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

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

Acts of misconduct

Where an M&A transaction involves misconduct on the part of directors or officers – for example, where directors have not complied with their fiduciary duties, or such M&A transaction is the result of a director's conflict of interest or fraudulent act – the Companies Act, 2013 (Companies Act) has specifically provided for various statutory duties

upon the directors, the breach of which could lead to action being initiated against them under the relevant provisions of the Companies Act.

Breaches of statutory duties and obligations

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

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

Requirements for successful claims

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

Applicable thresholds

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

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

Grounds

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

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

Non-compliance with statutory duties and obligations

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

Remedies in contractual disputes

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

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

- the SEBI (Prohibition of Insider Trading) Regulations, 2015, which, inter alia, prohibit the sharing of unpublished price-sensitive information (whether or not in conjunction with the trading of shares) and are geared towards levelling information asymmetry in the market;
- the SEBI (Substantial Acquisitions and Takeovers) Regulations 2011, which require shareholders acquiring a certain percentage of shares or control in a listed company to make an open offer to acquire the shares of other shareholders who are not party to such arrangement due to which the open offer was triggered;

- where the acquisition would result in delisting, the dissenting shareholders have the right to seek an exit from the promoters of the company in accordance with the provisions of the SEBI (Delisting of Equity Shares) Regulations 2009; and
- additionally, the SEBI has also mandated that listed companies making disclosures in relation to their material transactions follow certain corporate governance norms and obtain relevant approvals under the SEBI (Listing Obligations and Disclosure Requirements) Regulations 2015. These norms include the formation of a stakeholders' grievance committee that is required to address shareholders' grievances in a time-bound manner, failing which the shareholders may approach the SEBI or the stock exchange where the shares of such companies are listed.

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

Form of transaction

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

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

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?

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

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

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

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

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?

No. There is no provision under the Companies Act that entitles a shareholder to bring derivative actions on behalf of or in the name of the

company. The Companies Act permits a shareholder to initiate class action proceedings only on behalf of the members or depositors of the company.

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?

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

Early dismissal of shareholder complaint

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

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

ADVISERS AND COUNTERPARTIES

Claims against third-party advisers

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

Claims in a class or derivative action

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

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

Claims before governing bodies

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

Claims in the case of listed companies

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

Claims against counterparties

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

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

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

Statutory or regulatory limitations on claims

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

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

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?

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

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?

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

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.

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?

Statutory duty

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

Director's interest

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

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 ratably with all shareholders?

The standard does not vary if a controlling shareholder is a party to the transaction or is receiving consideration in connection with the transaction that is not shared ratably with all shareholders.

INDEMNITIES**Legal restrictions on indemnities**

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

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

M&A CLAUSES AND TERMS**Challenges to particular terms**

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

If a shareholder had a right pursuant to which his or her prior consent or approval had to be sought for any agreement that a company may

enter into, and if such consent or approval has not been obtained, the aggrieved shareholder may challenge the terms of an M&A document.

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

Insurance

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

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

Burden of proof

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

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

Pre-litigation tools

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

There is a statutory right to inspect:

- annual returns;
- registers of members;
- the minutes of shareholders' meetings;
- financial statements;
- the register of directors and key managerial personnel;
- the register of loans and guarantees;
- the register of contracts and arrangements in which directors are interested; and
- the contracts of employment of the managing director and full-time directors.

Forum

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

Under the Companies Act, the following, inter alia, are required to be heard by the NCLT in whose jurisdiction the registered office of the company is located:

- legal proceedings concerning mergers;
- demergers;

- amalgamations;
- windings-up;
- reductions of capital;
- oppression and mismanagement; and
- class actions.

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

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

Expedited proceedings and discovery

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

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

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

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

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

DAMAGES AND SETTLEMENTS

Damages

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

The grant of damages for breach of contractual obligations is, inter alia, governed by the Indian Contract Act 1872 (the Contract Act).

Parties may contractually provide for the payment of damages in the event of a breach of contract. Such damages are granted only if the courts find the sum in question (not exceeding the amount of liquidated damages mentioned in the contract) to be a genuine pre-estimate of the damages. If not then the court will only grant reasonable compensation. In making a claim for liquidated damages, proof of loss or damage is imperative, except in circumstances when damage or loss is difficult or impossible to prove.

Settlements

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

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

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

THIRD PARTIES

Third parties preventing transactions

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

Interest in property

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

Contractual breach

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

Regulatory proceedings

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

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

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

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 Companies Act imposes various duties on directors. For example, they should exercise their duties with due and reasonable care, and skill and diligence, and they shall exercise independent judgment. Similarly, they should not be involved in a situation in which they may have a

direct or indirect interest that conflicts, or that possibly may conflict, with the interests of the company. Such duties may require them to proactively disclose any unsolicited or unwanted proposals to the board of directors.

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?

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

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

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



Naresh Thacker
nareshthacker@elp-in.com

Bhavin Gada
bhavingada@elp-in.com

109A, 1st Floor
Dalamal Towers, A Wing
Free Press Journal Road
Nariman Point
Mumbai 400 021
India
Tel: +91 22 6636 7000/+91 90 0467 5224
Fax: +91 22 6636 7172
www.elplaw.in

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