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Getting The Deal Through

M&A Litigation

in Turkey

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Turkey

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TYPES OF SHAREHOLDERS' CLAIMS

Main claims

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

Under Turkish law, the main claims shareholders can assert against corporations, officers and directors in connection with M&A transactions are as follows:

- liability claims against officers and directors;
- claims challenging shareholder and board resolutions; and
- compensation claims.

In addition to the above, specific to mergers the following claims should be mentioned:

- liability claims against officers and directors who have prepared or given false or fraudulent documents, undertakings and warranties regarding mergers;
- claims requesting cancellation of a merger; and
- compensation claims arising from a breach of shareholders' rights due to merger.

Requirements for successful claims

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

To bring a successful suit in liability claims against directors, shareholders should prove that the directors have not acted prudently and that they have breached one of their obligations, such as loyalty, duty of care or equal treatment of shareholders.

Regarding a successful suit in claims challenging shareholder resolutions, shareholders should demonstrate the violation of code, articles of association or good faith principle. The plaintiff shareholder should not cast positive votes for the shareholder resolution and should have this recorded in the meeting's minutes.

As for compensation claims, the shareholder filing the claim as a rule has the burden of proof including the loss or damage adequate causal nexus and fault.

It is of particular importance, especially in complex litigation, to explain the claim systematically and in detail, to the extent necessary, and to establish the links among the claim, legislation and evidence clearly in particular to help a busy judge of the state court not to lose sight of the route between the claim and the desired judgment. Claims are typically supported by independent expert opinions by prominent academics.

Publicly traded or privately held corporations

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?

Under Turkish law, in general, the types of claims that shareholders can bring do not differ depending on whether the corporations involved in the M&A transactions are publicly traded or privately held.

However, in terms of public companies, there are several obligations and rights regarding M&A transactions that are regulated under Capital Markets Code that should be taken into consideration. To exemplify:

- even if it is not set forth in the merger agreement, shareholders who voted against the transaction are entitled to an appraisal right by selling their shares to the publicly held corporation;
- a mandatory bid rule will apply, where the buyer acquires control of the public company obligating the acquirer of controlling shares to make an offer to purchase the shares of the remaining shareholders; and
- shareholders are granted with squeeze-out rights allowing shareholders reaching a ratio of the voting rights to be determined by the Capital Markets Board to squeeze out the minority shareholders.

Form of transaction

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

In general, the types of claims that shareholders can bring do not differ depending on the form of the transaction; however, specific to mergers (ie, the scope of directors' liability, lapse of time and nature of compensation) as the case may be could vary.

Negotiated or hostile transaction

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 depending on whether the transaction involves a negotiated transaction or a hostile one. However, although hostile bids have not been regulated under Turkish law, the procedure of voluntary tender bids in publicly held corporations is regulated under capital markets law.

Party suffering loss

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

Regarding the loss directly suffered by shareholder, only shareholder that suffered direct loss can bring a claim.

As for the loss directly suffered by the corporation and indirectly by the shareholder, the corporation and the shareholder can both bring a claim; where the claim is brought by the shareholder, it is not brought on behalf or in the name of the corporation but by the shareholder itself and compensation should be paid directly to the corporation and not to the shareholder.

COLLECTIVE AND DERIVATION LITIGATION

Class or collective actions

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?

Under Turkish law, class and collective actions are not permissible. A similar concept, group actions enable

associations and other legal entities to file actions on their own behalf to protect the rights of their members or the group they represent. As this is a recourse limited to legal entities, shareholders cannot benefit from it.

However, in the case of merger, demerger or conversion of legal form, where a shareholder initiates court proceedings and requests equalisation compensation, the court decision will also govern other shareholders in the same legal position.

Derivative litigation

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

Where a loss is directly suffered by the corporation and indirectly by the shareholder, the shareholder can bring a claim but not on behalf or in the name of the corporation, and compensation should be paid directly to the corporation. Where the corporation is in liquidation, the right to initiate the aforementioned claim primarily belongs to the bankruptcy trustee; the shareholder can bring this claim if the bankruptcy trustee does not initiate it.

INTERIM RELIEF AND EARLY DISMISSAL

Injunctive or other interim relief

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

According to the Code of Civil Procedure, the judge may order any type of interim measure in case, the absence of interim measure will result in severe difficulty or impossibility to exercise the right or if a delay would cause an inconvenience or serious damage. The court may decide interim remedies ex parte if the requesting party's rights should be immediately protected.

Under Turkish law, the court may only modify contractual terms in very limited circumstances. An example would be hardship where the performance of the obligation does not become impossible, but becomes quite difficult. Provided that relevant conditions are met, the party claiming hardship may first request from the court the adaptation of the agreement in accordance with the changed circumstances, and if the adaptation is not possible, may revoke the agreement.

Early dismissal of shareholder complaint

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

There is no disclosure or discovery procedure under Turkish Law; parties should submit their evidence based on their claims as a rule.

However, if procedural requirements – such as jurisdiction, capacity to sue, advance costs, etc – are not met, the court would not proceed with the merits of the case and dismiss the case.

ADVISERS AND COUNTERPARTIES

Claims against third-party advisers

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

Shareholders can bring claims against third-party advisers that assist in M&A transactions arguing that contractual obligations are breached or based on tortious acts of third-party advisers, as the case may be.

In addition, third-party advisers who have prepared false, fraudulent, fake and untrue M&A documents or have made false undertakings, statements and warranties regarding M&A documents or who have participated in the aforementioned will be held liable. Also, third-party advisers who have participated in corruption in appraising the capital in kind or acquired company will be held liable.

In practice, it is rare to see claims against third-party advisers as the concept of a third party's professional negligence has not developed in Turkey.

Claims against counterparties

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

In principle, shareholders may bring claims only against directors, officers, auditors and founders of the corporations in which the shareholders hold shares. However, any person involving in a merger, demerger or conversion of legal form and breaching duties set forth by relevant special provisions of the Turkish Commercial Code may be held liable by the shareholders of the corporations involved.

LIMITATIONS ON CLAIMS

Limitations of liability in corporation's constitution documents

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 Turkish law, board members cannot be exempted from their main obligations of fulfilling their duties personally, loyalty, duty of care and equal treatment of shareholders, etc. However, there is a discussion in the doctrine that board members and executives may be excluded from being held liable from their breach resulting from slight negligence.

Apart from the non-assignable authorities, board members can transfer the management authority and liability to certain board members or third parties and thus limit their own liabilities. Unless it is proven that the board members assigning their authorities have not appointed the assignee with reasonable diligence, the delegating members cannot be held liable.

Statutory or regulatory limitations on claims

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?

Directors may be explicitly released from their liabilities through a general assembly resolution. Shareholders who have voted in favour of the release resolution and acquiring shareholders who have knowledge of the release resolution may not bring claims against directors. Other shareholders may bring claims in six months as of the resolution date.

Additionally, the approval of the balance sheet results in the implicit release of the directors unless indicated otherwise in the general assembly resolution. However, if the balance sheet obscures the company's real conditions or is not properly provided and this is intentional, the approval does not result in a release.

Common law limitations on claims

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

Although Turkey has a civil law system, business judgement rule is mentioned in the reasoning of the Turkish Commercial Code and board members or executives can argue that their decisions in relation to M&A transactions fall under the business judgement rule. Thus, in this context, business decisions rendered with good faith based on reasonable grounds cannot result in liability of the board members or executives.

STANDARD OF LIABILITY

General standard

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?

In general, a board member or executive may be held liable either due to breach of statutory obligations or company's articles of association with fault. Thus, breach of obligations that do not constitute breach of statutory obligations (eg, obligations stated under employment or proxy agreements) would not fall under this scope. Also, the scope of 'obligations' is more limited compared to 'duties'. To exemplify, preserving a company's capital and assets, complying with the principle of equal treatment are classified as obligations, whereas management of the company as per corporate governance principles is a duty.

Board members or executives are obliged to act with due care of a prudent director and to protect company's interests in accordance with the principle of good faith.

As regards an M&A transaction, the standard of liability does not differ from the aforementioned general rules.

Type of transaction

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

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

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

If one or more directors or officers have potential conflicts of interest in connection with an M&A transaction, though the standard does not vary, certain limitations will apply:

- board members cannot participate in the discussions when there is a conflict of interest between the company and the board members or between their relatives by blood or marriage. This prohibition is also applied in cases where the non-participation of the board member in the discussion is a requirement of the principle of good faith;
- board members are prohibited from carrying out any transaction that falls within the scope of the company's activity on the account of himself or herself or a third party without the general assembly's approval, or cannot become an unlimited partner to a company that has a similar scope of activity; or
- board members are prohibited from carrying out any transaction on behalf of themselves or a third party without the general assembly's approval.

Controlling shareholders

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. However, the principle of treating shareholders equally under equal conditions should be taken into consideration because the breach of the principle of equal treatment, which is one of the main obligations of board members, could result in the liability of board members.

INDEMNITIES

Legal restrictions on indemnities

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

There is no such general regulation. However, if the defendant officers and directors have acted intentionally or grossly negligently, the company will be prohibited from indemnifying or advancing the legal fees.

Moreover, since board members are prohibited from carrying out any transaction on behalf of themselves without the general assembly's approval, the company's ability to indemnify or advance the legal fees will also be subject to the general assembly approval.

Under Turkish law, it is possible for companies to enter into and pay for directors and officers' liability insurance agreement for the benefit of the directors and officers.

M&A CLAUSES AND TERMS

Challenges to particular terms

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

In general, shareholders may challenge general assembly resolutions and board of directors resolutions in relation to M&A transactions, but not particular clauses or terms in M&A documents.

Particular to merger, shareholders of public companies who oppose a merger resolution are entitled to exit by way of selling their shares to the company; in the case of a change of control in the company, the party acquiring control must make a tender offer to the remaining shareholders; and shareholders reaching a certain ratio of the voting rights are entitled to squeeze out remaining shareholders.

PRE-LITIGATION TOOLS AND PROCEDURE IN M&A LITIGATION

Shareholder vote

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

Shareholders who approve a general assembly resolution in relation to an M&A transaction or who do not specifically record their opposition to the aforementioned resolution may not bring a claim for cancellation of the general assembly resolution, which is often the foremost tool to prevent closing.

Insurance

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

Directors and officers' insurance plays a significant role in shareholder litigation arising from M&A transactions if M&A transactions are not excluded from the scope of the insurance.

As for public companies, if the damage is insured at a price exceeding 25 per cent of the company's total share capital, this must be announced in the Capital Markets Board bulletin.

Burden of proof

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 shareholder has the burden of proof in liability actions against board members and officers for all facts that are favourable to the shareholder. The plaintiff shareholder must prove breach of duty, loss or damage, the adequate causal nexus and fault; the burden of proof does not shift.

Pre-litigation tools

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

Shareholders have a statutory right to information and inspection rights regarding the company, which include right of access to financial statements, annual activity reports of the board of directors, audit reports and the board of directors' proposals in relation to distribution of dividend, etc.

Moreover, shareholders also have the right to obtain information on the company's businesses from the board of directors and on the method and the outcome of the audit conducted from the auditors at the general assembly meeting.

Furthermore, any shareholder may request from the general assembly that specific company matters be investigated by way of a special audit when it is necessary to exercise shareholder rights provided that the shareholder has exercised the statutory right to information and inspection beforehand. If the general assembly of shareholders rejects the request of special audit, shareholders who together represent at least 10 per cent of the share capital in private and 5 per cent of the share capital in public companies or hold shares with a nominal value of 1 million lira may apply to the court demanding that a special auditor be appointed.

Forum

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

Under Turkish law, cancellation of general assembly resolution is considered to be related to public order, therefore, it would not be possible to settle such claims, neither arbitrate nor mediate. Such actions for the cancellation of general assembly resolutions must be brought at the seat of the corporation.

The liability actions against directors or officers may either be brought at the seat of corporation or at the defendant's domicile; the arbitrability of liability actions is controversial.

In terms of cancellation of board of director resolutions, the arbitrability of such claims is also arguable in the doctrine.

Expedited proceedings and discovery

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

In relation to M&A litigation, expedited proceedings do not exist under Code of Civil Procedure. If the dispute resolution clause of the M&A transaction refers to arbitration, expedited arbitration may be applicable subject to an arbitration clause or the procedural rules of arbitration chosen by the parties.

Discovery is not available under Turkish law.

DAMAGES AND SETTLEMENTS

Damages

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

Under Turkish law, there is not a special provision or specific method to calculate damages in M&A litigation. In accordance with general provisions of Turkish law, there are different types of damage such as positive damage – negative damage, actual damage (damnum emergens) – loss of profit (lucrum cessans) etc. Positive damage is the difference between the injured party, the creditor's actual assets and the injured party's hypothetical assets if the obligation had been performed in compliance with the agreement. Negative damage results from losses by the injured party due to his reliance on the validity of the agreement, and is the difference between the injured party's assets in the period after the agreement was rescinded and the injured party's hypothetical assets had the injured party never entered into such agreement. Although controversial, it is accepted in doctrine that actual damage and loss of profit

may also arise in the form of negative damage.

While calculating the amount of damages, both the degree of fault and the particulars of the case, such as contributory negligence by the injured party, shall be taken into consideration.

In practice, Turkish courts appoint an expert or an expert committee to calculate the amount of damages.

Settlements

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

As of 1 January 2019, commercial disputes where the subject matter is a debt or indemnity claim requiring the payment of a sum of money is subject to mandatory commercial mediation to be completed within six weeks, which can be extended for a maximum of two weeks.

In terms of actions initiated for the cancellation of general assembly resolutions, the defendant would be the company itself and not the other shareholders. Cancellation of general assembly resolutions is considered to be related to public order, therefore, it would not be possible to settle such claims, neither arbitrate nor mediate. However, the aforementioned does not prevent the plaintiff shareholder from withdrawing the claim.

THIRD PARTIES

Third parties preventing transactions

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

In principle, third parties (eg, other interested financial or strategic buyers) are not entitled to bring litigation to break up or stop agreed M&A transactions prior to closing except for special circumstances such as a third party having a pre-emptive right or voluntary takeover bids in publicly held corporations.

Third parties supporting transactions

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

Generally, Turkish law does not entitle third parties to use litigation to force or pressure corporations to enter into M&A transactions. However, Turkish Commercial Code in general and capital markets legislation in particular allow shareholders under certain circumstances to sell their shares to the company, or to force a buyer who acquires control of a public company to make a tender offer.

UNSOLICITED OR UNWANTED PROPOSALS

Directors' duties

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 accordance with their obligations of loyalty and to act with the due care of a prudent executive, directors should inform the shareholders of the unsolicited or unwanted proposal and to treat all shareholders in similar circumstances equally. Where a mandatory tender offer is required due to transactions changing control of the company, directors

shall comply with special provisions of the capital markets legislation.

COUNTERPARTIES' CLAIMS

Common types of claim

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

Commonly asserted counterparty claims (ie claims that buyers and sellers may bring against one another) arise mainly from share purchase agreements and shareholders' agreements. The most common remedies available for buyers and sellers are indemnification, termination and post-closing adjustments, whereas the common legal grounds in M&A disputes include representations and warranties, purchase price adjustments, earn-out clauses or material adverse change clauses.

In terms of post-closing claims, share price adjustment and earn-out claims are of special importance. Regarding earn-out claims, if the seller will manage the business in accordance with the relevant M&A agreement, the buyer may be concerned with the seller's manipulation of the earn-out calculation by way of either overstating revenue or understating or minimising expenses. On the other hand, if the buyer is to manage the business, the seller may be concerned with the buyer's mismanagement, which may cause the target corporation to miss targets. The same concerns may be valid also in share price adjustment claims.

Differences from litigation brought by shareholders

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

Litigation between the counterparties to an M&A transaction (ie, buyers and sellers) is generally based on contractual relationship, and disputes arising between the counterparties to an international M&A transaction or to an M&A transaction of considerable value are often resolved through arbitration, as most parties prefer arbitration to state court proceedings.

However, challenges against general assembly resolutions must be brought before state courts at the seat of the corporation as such disputes are considered non-arbitrable under Turkish law as it relates to public order.

UPDATES AND TRENDS

Recent developments

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

The practice of warranty and indemnity insurance is still limited in the Turkish market due to lack of a specific legal framework, and insurance policies seen lately are taken out by foreign parties through foreign insurance companies. Having said that, it is clear that it will become popular following the global trend in private M&A transactions.

Turkey is facing threats of sanctions from some of its western allies, as a result of which sanction-related terms and disputes may become more common in M&A agreements and litigation.

It goes without saying that covid-19 has seriously affected and will continue to affect M&A transactions and disputes, and that, in this context, force majeure clauses have become more important than before.

LAW STATED DATE

Correct on

Give the date on which the above information is accurate.

23 September 2020.