Chapter

Israel

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1 Relevant Authorities and Legislation

1.1 What regulates M&A?

The acquisition of publicly-traded Israeli companies is governed primarily by the Companies Law, 5759-1999 (the "Companies Law") and the Securities Law, 5728-1968 (the "Securities Law"). In particular:

- Sections 314 to 327 of the Companies Law deal with acquisitions by way of merger. These sections are augmented by the Companies Regulations (Merger), 5760-2000.
- Acquisitions by way of tender offer are governed by Sections 336 to 340 of the Companies Law, and by the Securities Regulations (Tender Offer), 5760-2000.
- Acquisitions by way of a court-approved merger or similar arrangements are governed by Sections 350 and 351 of the Companies Law, as well as by the Companies Regulations (Application for Settlement or Arrangement), 5762-2002.
- The Securities Regulations (Periodical and Immediate Reports), 5730-1970, govern the reporting obligations of companies listed on the Tel Aviv Stock Exchange ("TASE") that are party to a merger.
- In the event that securities, and not cash, are used as consideration for an acquisition, the provisions of Section 15 of the Securities Law dealing with the requirements for a prospectus are also implicated.
- Israeli companies listed in the United States would also in general be subject to applicable U.S. law, including the U.S. Securities Exchange Act of 1934 and the rules and regulations promulgated thereunder.

Additional regulatory schemes also play a role in regulating acquisitions (see question 1.4 and question 2.12 below).

1.2 Are there different rules for different types of company?

The rules of the Companies Law generally apply equally to private and public companies, although the internal approval processes in public companies are subject to special rules. Where a public company is involved in the transaction, certain disclosure requirements are triggered. For the most part, the acquisition of an Israeli public company will be structured and implemented in the same manner regardless of whether the company is listed solely on the TASE, listed on an exchange outside of Israel or dual listed. However, Israeli companies that are traded solely overseas, or that are dual-listed on the TASE and on a recognised non-Israeli exchange, may benefit from certain dispensations:

- Foreign/dual-listed companies need not conform with the Israeli law requirements for a Special Tender (see question 5.1 below) where the relevant foreign law regulates such companies' tenders for acquiring control of target companies, or where the acquisition of control obligates the offeror to make a tender to the shareholders among the general public. [Note that U.S. law is *not* deemed to comply with these requirements.]
- Israeli law requirements concerning proxy statements need not be followed where shareholders will be provided with proxy statements that are in compliance with applicable foreign law.
- The reporting requirements under the Securities Regulations (Periodic and Immediate Reports), 5730-1970 do not apply to Israeli companies traded abroad or dual-listed, although the foreign filings of dual companies are required to be filed in Israel as well.

1.3 Are there special rules for foreign buyers?

In general, there are no inward investment restrictions and foreign buyers are encouraged to invest in Israeli companies. However, there are certain restrictions on the ownership by non-Israeli entities or persons of interests in Israeli companies in certain sensitive industries (see question 1.4 below). In addition, nationals of some countries that are, or have been, in a state of war with Israel, may not own securities in Israeli companies. Moreover, if the Israeli target company benefits from certain governmental funding (such as grants from the Office of the Chief Scientist or tax benefits (under Approved Enterprise or Benefitted Enterprise programmes)), then approval of the relevant government agency may be required for the acquisition of the Israeli company by a non-Israeli resident.

1.4 Are there any special sector-related rules?

For companies belonging to specific industrial sectors, the acquisition of a certain ownership percentage or of control requires special regulatory approvals. For example:

- The acquisition of 5% or more of the shares of a bank or a bank holding company requires a permit issued by the Governor of the Bank of Israel after consultation with the Bank of Israel's Licensing Committee.
- The acquisition of 5% or more of the shares of an insurance company requires a permit from the Superintendent of Insurance Businesses.
- The acquisition of certain percentages in companies providing telecommunications services may require a licence from the Ministry of Communications.

- The acquisition of 5% or more of the shares of El Al (the Israeli national air carrier) requires a permit from the government.
- The acquisition of a company managing pension funds requires the consent of the Israeli Securities Authority.
- The acquisition of a controlling stake in a brokerage firm that is a member of the TASE is subject to the approval of the TASE.
- In certain cases regarding the acquisition (primarily by means of privatisation of government companies) of companies controlling natural resources or essential services, the State of Israel will retain certain veto rights and other powers.

1.5 Does protectionism operate in favour of local owners?

Apart from the special sector-related rules discussed in question 1.4 above, there are no are no rules or regulations that favour local owners over foreign owners.

1.6 What are the principal sources of liability?

Liability, for the most part, will derive from failure to address the technical rules that apply to the tender offer process and to any misrepresentation made by an offeror in the offer or other transaction documents. There are additional rules of general application that apply to such matters as insider trading and market manipulation. Civil and criminal sanctions can apply to companies and to their directors and officers for such matters as breach of fiduciary obligations. In Israel, shareholders have a duty to act in good faith and a reasonable manner, and in some cases of a duty of fairness towards the company.

2 Mechanics of Acquisition

2.1 What alternative means of acquisition are there?

There are three primary procedures to gain 100% of the shares of a public company:

- Reverse Triangular Merger. The reverse triangular merger is the most common way for an acquirer to gain full ownership of an Israeli public company and to take it private. The acquirer typically establishes a wholly-owned subsidiary in Israel ("Merger Co"). Merger Co merges with and into the Israeli target company, with the Israeli target surviving the merger and becoming a wholly-owned subsidiary of the acquirer. The consideration payable to the shareholders of the Israeli target company may be cash or the acquirer's stock, or a combination of the two.
- Tender Offer. The acquirer makes an offer to purchase some or all of the shares of the target company, usually using cash or, less frequently, its own stock. The offer may be conditioned upon successful acquisition of all of the shares of the target company. If the requisite majority of target shareholders approve, then the acquirer can acquire 100% of the shares of the target. The requisite majority is very high: holders of 95% of the issued and outstanding shares of the target (not 95% of the shares of responding shareholders) must respond positively to the offer. The positively responding holders must also comprise a majority of the shares held by offerees who do not have a personal interest in the tender offer, subject to certain exceptions. Where the acquirer reaches 100% of the shares, Target shareholders have a six-month window, following consummation of the transaction, to apply to the court to challenge the fairness of the transaction. The acquirer may, however, stipulate in its tender offer that this appraisal remedy will not be available to shareholders that accept the offer, and such stipulation is valid.
- Court-Approved Merger. Sections 350 and 351 of the Companies Law appear, on their face, to deal with arrangements between companies and their creditors and shareholders. However, these statutes can and have been be used to effect mergers between two companies. The procedure requires two applications to the court: one to authorise the convening of a special meeting of the shareholders and creditors of the target company; and a second to approve the arrangement reached by the creditors and shareholders. In the current regulatory climate, this procedure, although cumbersome and requiring court approval, enables the parties to surmount certain difficulties posed by Israeli securities law, and are often the preferred method to where the target has outstanding listed options or debentures.

2.2 What advisers do the parties need?

Typically, in order to carry out an acquisition, the parties will need the following advisers:

- Legal Counsel. The acquirer will require Israeli legal counsel, and if the acquirer is not an Israeli company, it will often be accompanied by legal counsel from its home jurisdiction. Israeli counsel's role is to make sure that the applicable corporate, regulatory and tax matters are properly considered, and, in the case of court-approved mergers, to deal with the Israeli courts. Home country counsel may be required to assure compliance with the acquirer's internal corporate requirements and with applicable non-Israeli securities, antitrust, and other laws. The target company can often make do with just Israeli counsel.
- Investment Bankers. In larger transactions, both the acquirer and target will be advised by investment banking firms, who guide the parties, sometimes help structure the transaction, and, with respect to the target, are called upon to give independent appraisals of the fairness of the consideration being offered to the target shareholders.
- Accountants. Often accountants for one or both parties are involved in conducting due diligence and obtaining tax rulings (as described in question 2.14 below).

2.3 How long does it take?

The timetable is a function of the structure of the transaction:

- Reverse Triangular Merger. Once the merger agreement is negotiated and signed, which can take anywhere from several weeks to several months, each of the merging parties must provide notice to its shareholders of the convening of a shareholders meeting for purposes of approving the merger, and file a formal "merger proposal" with the Israeli Registrar of Companies. The filing of the merger proposal (which is a relatively short, technical document, with information about the parties and terms of the transaction) starts a time clock, and the merger can only take effect on the later of: (i) 50 days from the filing; or (ii) 30 days from the approval of the shareholders of each of the merging companies. Israeli public companies are required to give their shareholders at least 35 days' notice of meetings to consider merger transactions, so a minimum of 65 days would be required between signing and closing. More realistically, this period is typically 80 to 100 days.
- Tender Offer. A tender offer for full ownership of the target company is commenced by the filing of a tender offer memorandum (the "Tender Memorandum"), which must state the last date for accepting the offer (the "Final Date").

The Final Date must not be sooner than 14 days nor later than 60 days following the date of the Tender Memorandum.

- Court-Approved Merger. Once the merger agreement is negotiated and signed, which can take anywhere from several weeks to several months, the target company files an application to the Israeli court to authorise the convening of a meeting of shareholders and, if relevant, creditors. The court will typically respond within two weeks, but is not required to do so. The response will authorise the holding of a meeting of shareholders and creditors, typically within approximately 35 days. After the meeting is held, the court is again petitioned to approve the results of the meeting. The total time elapsed is approximately 60 days from the initial court application, although the time may be extended if the court does not rule on the various applications in a timely manner, or the court requests responses from third parties, such as the Israel Securities Authority.

2.4 What are the main hurdles?

The principal milestones are: (i) preparation of a term sheet or letter of intent (not legally required, and not required at all in the case of a tender offer); (ii) performance of legal, business and accounting due diligence; (iii) drafting and negotiation of a definitive merger agreement (in the case of a merger) or Tender Memorandum (in the case of a tender offer). Thereafter, the continuation depends on the structure that has been selected:

- In a tender offer, the offer is made and it is then determined whether there has been a sufficient positive response. Receiving the required 95% (or 98%, if there is not a majority of the shares held by disinterested shareholders responding positively) response is the main hurdle.
- In a reverse triangular merger, the parties give detailed notice of and hold shareholder meetings, make statutory notices to creditors and workers committees, and wait for the statutory "time clock" to lapse. Receiving the requisite shareholder approval is the main hurdle.
- In a court-approved merger, the parties apply to the court first to hold a meeting of shareholders and creditors, and next to approve the results of the meeting. Obtaining the requisite shareholder and court approvals are the main hurdles.

In addition, if the transaction is deemed under Israeli law to be an "extraordinary transaction" (such a transaction with a controlling shareholder), the main hurdle will be obtaining shareholder approval which must fulfil one of the following requirements:

- a majority of the disinterested shareholders; or
- the votes of shareholders who have no personal interest in the transaction and who vote against the transaction may not represent more than two percent (2%) of the voting rights of the company.

2.5 How much flexibility is there over deal terms and price?

There are no rules that dictate minimum offer price or other deal terms. With respect to tender offers and reverse triangular mergers, the offer must be on equal terms for all target shareholders holding the same type of security. Even where a tender is approved by the requisite majority of shareholders, in the case of a "full" tender offer, shareholder who did not positively accept the offer may still appeal to the court to determine that the terms of the offer are less than fair value. Case law in Israel indicates that the court in such cases will not necessarily accept the market (trading) value of the shares as the fair value, and may determine a fair price based on the asset value (assets less liabilities) or the operational value (projected cash flow) of the company.

2.6 What differences are there between offering cash and other consideration?

Apart from cash, the most common consideration used in the acquisition of Israeli companies is the publicly-traded stock of the acquirer. The use of the acquirer's securities as the "currency" for the acquisition raises issues under the Securities Laws, in particular where the target is a public company. In general, unless an exemption is available, the offer of securities (including the securities of an acquirer) to more than 35 Israeli resident offerees (including the shareholders and option holders of the target) requires an Israeli prospectus. Israeli-resident "classified" investors, as defined in the Securities Laws (institutional investors, high net worth individuals and large companies), are not included in the 35. In addition, exemptions are available with respect to the assumption of the options held by the target's option holders. There are several ways to deal with this issue:

- *Prepare an Israeli prospectus*. An Israeli prospectus must be prepared in the Hebrew language. Doing so is expensive, time-consuming, and may involve requirements that are inconsistent with or contradict home country securities laws. Moreover, once an Israeli prospectus is prepared and filed, the company becomes subject to Israeli periodic and immediate reporting requirements. As a result, this alternative is not typically used.
- *Structure the transaction as a court-approved merger*. In the context of a court-approved merger, as described above, the Israel Securities Authority ("ISA") has the power to grant an exemption to the prospectus requirement. A number of transactions have been done in this manner.
- *Dual-list the acquirer's securities on the Tel Aviv Stock Exchange*. This option may be available to acquirers listed on certain US or UK exchanges. If available, the dual listing of the acquirer's securities on the TASE enables the ISA to permit the transaction to go forward on the basis of the acquirer's US or UK securities filings, without the requirement of a Hebrew language Israeli prospectus. The ongoing reporting requirements continue to be substantially subject to the applicable US or UK regulations. There are at least two examples of transactions done in this manner.

2.7 Do the same terms have to be offered to all shareholders?

Generally yes, see question 2.5 above.

2.8 Are there obligations to purchase other classes of target securities?

In an acquisition of 100% of the shares of the target the acquirer often prefers that that all the target's options and convertible debentures will either be exercised or converted, or else purchased concurrently with the acquisition of the shares. It is difficult to implement an acquisition of securities other than shares if the acquisition is done by way of reverse triangular merger, and therefore, the acquisition of targets with listed warrants or convertible debentures is often accomplished by means of court approved merger.

If a full tender offer for shares listed on the TASE is accepted and the purchaser obtained 100% of the shares, the purchaser is required to make an offer to purchase all the outstanding TASE listed options and convertible debentures of the target for a price not lower than the average TASE price of such securities during the two months period preceding the publication of the initial tender offer for the shares.

2.9 Are there any limits on agreeing terms with employees?

In general, employees' approval is not required for a change of control. In certain cases, a change of control of the employer may be deemed constructive termination, entitling the employee to resign and receive severance pay.

Acquirers typically want to ensure that key target employees have entered into or reaffirmed employment agreements. In doing so, certain restrictions will apply:

- For the most part, non-competition undertakings will not be enforced against employees. They may be enforced against founder-employees who are receiving significant consideration for the sale of a business.
- Employees may not waive certain basic rights, including the right to statutory severance, vacation and notice pay.

2.10 What role do employees play?

In statutory merger, if the target company has a worker's council, it would be entitled to notice of the proposed merger, and would have an opportunity to submit an objection to court before the 50- (or 30-) day waiting period lapses.

For the most part, when the target company is in the high-tech industry, the employees will not be represented by labour unions and, employees will not be seeking to revise the terms of their employment, particularly where the employees hold options and directly benefit from the acquisition. Labour unions play a more active role in companies in traditional industries with large numbers of employees, and if the target is purchased for a large premium, it is possible that the labour union will demand that the employees are paid an "acquisition" bonus, although paying such a bonus is not required by law.

2.11 What documentation is needed?

See the descriptions of the different forms of acquisition transaction in questions 2.1, 2.3 and 2.4 above.

2.12 Are there any special disclosure requirements?

In tender offers and mergers, where the target company is public and listed solely on the TASE, the disclosure requirements are clearly set out by the regulations promulgated under the Securities Law. Valuations and other material financial information considered by the board of directors of the target in connection with the acquisition must be disclosed to the target's shareholders, including copies or descriptions of any fairness opinions that have been obtained.

2.13 What are the key costs?

The key transaction costs are likely to be legal fees and payments to investment bankers and accountants. There are some filing fees which are insignificant in comparison to the professional fees.

2.14 What consents are needed?

Apart from the specific regulatory consents that may be required with respect to particular industrial sectors (see question 1.4 above), the following consents and regulatory approvals may be necessary (or desirable) to execute the transaction:

- Antitrust. Approval of the Antitrust Commissioner is required pursuant to the Restrictive Trade Practices Act, 5748-1988, except where the volume of sales of the merging companies into the Israeli market is insignificant.
- Office of the Chief Scientist. Many Israeli technology companies have received research and development funding from the Office of the Chief Scientist of the Israel Ministry of Industry, Trade and Labour (the "OCS"). If so, OCS approval will be required for an acquisition by a non-Israeli purchaser. As a condition for such approval, the non-Israeli acquirer may be required to execute a standard undertaking that it will abide by OCS rules and regulations. In addition, various restrictions will apply to the transfer out of Israel of the intellectual property developed with OCS funding.
- Investment Centre. Many Israeli companies benefit from "Approved Enterprise Status" or qualify as "Benefited Companies", in each case a tax-advantaged status conferred by the Investment Centre of the Israel Ministry of Industry, Trade and Labour. If the target company has such a status, approval of the Investment Centre may be required.
- Israel Securities Authority. If the acquirer is assuming any stock options held by target employees or other target option holders, it is possible that an exemption from the requirement to publish a prospectus with respect to the grant of the acquirer's securities will be required from the ISA. Such exemptions are available as a matter of course if the acquirer's securities are traded on a recognised foreign exchange. In addition, if stock is being used as consideration for the acquisition, there may be other matters requiring ISA approval (see question 2.6 above).
- Israel Tax Authority. Although not legally required, it is often desirable to obtain pre-rulings from the Israel Tax Authority with respect to two matters: (i) clarifying the withholding obligation imposed on the acquirer in connection with payments made to the target shareholders; and (ii) providing that the assumption of employees' options by the acquirer would not result in an immediate tax event for target option holders.

2.15 What levels of approval or acceptance are needed?

The level of approval and the organs whose approval is required are function of the structure of the acquisition transaction:

- Reverse Triangular Merger. First, the board of directors of each merging company must approve the merger by a regular majority, and must specifically declare that, taking into account the financial condition of the merging companies, there is no reasonable concern that the surviving company will be unable to meet the obligations of the merging companies to their creditors. Second, the shareholders of each merging company must approve the merger. The requisite majority will typically be 50% (75% for companies established prior to the entry into force of the Companies Law in 2000 and which did not amend their Articles of Association in this respect); however, a greater majority may be fixed in the company's articles of association. If shares of the merging company are held by the other merging company, or by a person or entity holding 25% or more of the shares of the other merging company, or by a relative of the aforesaid ("Interested Shareholders"), then a majority of the shareholders, excluding the Interested Shareholders, must support the merger. If the merging company is the target company, then each class of securities must approve the merger. Court approval can be substituted for class approval.
- Tender Offer. See question 2.1 above with regard to a full tender offer and question 5.1 below with regard to a "special" tender offer.
- Court-Approved Merger. In addition to the approval of the court, a court-approved merger requires the approval of the

majority of the shareholders present and voting, representing at least 75% of the shares present and voting. If there are different classes of shares, then the same approval level is required from each class. The approval of creditors may also be required.

2.16 When does cash consideration need to be committed and available?

Typically, the cash consideration needs to be available at closing. If the target is listed on the TASE, payment will be made to the TASE Clearing House, which will distribute the payment among the target shareholders.

3 Friendly or Hostile

3.1 Is there a choice?

One can engage in a hostile acquisition by means of a tender offer made directly to the shareholders of the target. In practice, for the reasons set out in question 2.1 above, the carrying out of a tender offer for 100% control is fraught with uncertainty and not likely to be a realistic option. Moreover, on a practical level, ownership in Israeli public companies is often highly centralised, and Israeli corporate law restricts the use of the company's cash to finance the purchase (by means of a leveraged buy-out), thus making hostile takeover bids very unusual.

3.2 Are there rules about an approach to the target?

There are no special rules regarding the approach to the target.

3.3 How relevant is the target board?

The approval of the target board of directors is required to implement an acquisition by way of merger or court-approved merger. The approval is of the target board is not required in connection with an acquisition by means of a full tender offer. The board of the target is required, in connection with a "special" tender offer (see question 5.1 below) to provide its opinion as to whether it is "advisable" to accept the offer or to explain why it is not providing such an opinion. In a statutory merger, the board of directors must also consider the ability of the target company to satisfy its creditors following the transaction.

3.4 Does the choice affect process?

Yes, a hostile takeover is only possible by means of a tender offer. The other methods of acquiring a company require the cooperation of the target board.

4 Information

4.1 What information is available to a buyer?

Assuming the target is not willing to supply information directly (or is restricted from doing so under applicable antitrust rules), the bidder can obtain information from several public sources:

- For companies traded on the TASE, information is available on "Magna" (http://www.magna.isa.gov.il/), an online public filing distribution system, which is the Israeli equivalent of the SEC's EDGAR. These filings are also available on the website of the TASE. Magna's information includes: financial filings (quarterly and annual), detailed annual reports (akin to an SEC Form 20F or Form 10K), reports on substantial events (immediate reports), articles of association, list of major shareholders, etc.. These are available in Hebrew. Dual-listed companies (listed on non-Israeli exchanges) make their Magna submissions in English.
- The Israeli Registrar of Companies contains information regarding pledges imposed on the company's assets. For private companies, the Registrar of Companies contains additional information, such as the company's shareholders and directors and the articles of association.
- Many Israeli companies are traded abroad, primarily on the Nasdaq, and in such cases information is publicly available from the SEC.

4.2 Is negotiation confidential and is access restricted?

Israeli companies listed only in Israel are required to report any event that is outside the ordinary course of business or which may have a substantial influence on the company or the price of the securities of the company. In general, companies are required to report the existence of substantially advanced negotiations, even before signing a definitive agreement. These reports are publicly available. Immediate reports may be delayed (and often are) where reporting (i.e. public exposure) may jeopardise the consummation, or detrimentally influence the terms, of the transaction, provided that the information regarding the negotiations was not previously published in the media. There are no limitations under Israeli law on contact with shareholders of the target company, except that once such shareholders become aware of the potential transaction, then they become "insiders" and cannot trade in the shares of the target company.

4.3 What will become public?

When a public report is required, then the report must contain the essential elements (consideration, special terms, etc.) of the transaction.

4.4 What if the information is wrong or changes?

In a merger or court-approved merger, the merger agreement will govern the ability of the parties to terminate the agreement in the event of breaches of representations and warranties or discovery of new information. With regard to tender offers, the offeror may retract the tender offer during the time that the tender is "open" for response, if circumstances arise of which the offeror neither knew nor should have known, or which the offeror did not or could not foresee.

5 Stakebuilding

5.1 Can shares be bought outside the offer process?

Shares can generally be bought outside the offer process. To the extent that negotiation of the transaction has commenced, the purchaser should be cautious and consider whether the information that he possess regarding the negotiations is substantial enough to constitute inside information.

Where the target is a public Israeli company (listed in Israel or abroad), the exceeding of certain thresholds may trigger a mandatory tender offer requirement. Any acquisition resulting in a

shareholding exceeding: (i) 25% (where no other shareholder holds at least 25%); or (ii) 45% (where no other party holds 45%) of the voting rights, must be made by means of a "Special Tender", which requires making an offer on equal terms to all shareholders, and purchasing pro rata from the accepting shareholders. The shareholders may accept the offer, reject it or not respond.

5.2 What are the disclosure triggers?

Holders of 5% or more of the voting rights in an Israeli public company must report their identity to the company and thereafter report any additional acquisition of securities, providing details of the number of shares acquired, the consideration paid and certain additional information.

5.3 What are the limitations and implications?

In general, a party can acquire shares on the open market or from multiple sellers in private transactions. However, once the party holds 5% or more of the voting rights of the target, he is subject to disclosure as described in question 5.2 above, and once he reaches the triggers described in question 5.1 above, he is subject to the rules of a "special" or "full" tender offer, as applicable.

6 Deal Protection

6.1 Are break fees available?

In the absence of clear statutory direction or case law on the issue of break up fees, the consensus among practitioners is that reasonable break up fees, payable by the target company if it accepts a competing offer, or by a shareholder who fails to vote as promised in favour of a transaction, are permissible under Israeli law.

6.2 Can the target agree not to shop the company or its assets?

Israel has no clear statutory or case law guidance on the issue of "fiduciary outs". Accordingly, some practitioners take the view that a board of directors, in the reasonable exercise of its business judgement, may, consistent with its fiduciary obligations, agree for a reasonable period not to seek or present alternative proposals to shareholders. Others take the view that if the courts were called upon to rule on this issue, they would adopt rules similar to those adopted in the State of Delaware, and would require directors to present superior competing proposals to the shareholders. As a result of this legal lacuna, the issue of the extent of a "no shop" becomes a negotiated commercial issue in Israeli acquisition transactions. Recently, the concept of "go shop" provisions have found their way into some Israeli transactions.

6.3 Can the target agree to issue shares or sell assets?

In general, there is no Israeli statutory or case law that would prohibit the target from issuing shares or selling assets to frustrate an acquisition provided that such steps could be defended as a reasonable exercise of business judgement consistent with fiduciary obligations. Under the Companies Law, in the context of a "special" tender offer, directors and officers who take steps (other than negotiations aimed at improving the offer) intended to frustrate a tender offer will be liable to the bidder and the target shareholders unless they had reasonable grounds to believe that the steps taken were in the best interests of the target company.

6.4 What commitments are available to tie up a deal?

It is common, at the time of signing a merger agreement, to obtain undertakings from major shareholders to vote in favour of the merger. These undertakings are often accompanied by an irrevocable proxy in favour of the acquirer or someone acting on its behalf. In this connection, Israeli law requires shareholders to act in a customary manner and in good faith, and to avoid improper exploitation of their shareholder rights. Controlling shareholders also owe a duty of fairness (which has not been judicially defined) to the company and fellow shareholders.

7 Bidder Protection

7.1 What deal conditions are permitted?

Tender offers can only be conditioned upon the receipt of necessary governmental consents or permits and the requisite affirmative response of the target shareholders. Statutory and court-approved mergers can be conditioned on whatever legal, regulatory or business conditions that are agreed by the parties.

7.2 What control does the bidder have over the target during the process?

The bidder does not have any control over the target during the process apart from the restrictions on certain activities of directors and officers as described in question 6.3 above. Moreover, in the context of a statutory or court-approved merger, the parties must take care not to violate antitrust laws prior to receiving appropriate antitrust approval, if required. Nevertheless, in merger agreements it is customary for the target to undertake to continue its business in the ordinary course during the interim period between signing and closing, and to avoid certain extraordinary actions.

7.3 When does control pass to the bidder?

The bidder takes over day-to-day control of the target only after it has acquired the target shares and held a shareholders meeting to appoint new directors.

7.4 How can the bidder get 100% control?

The only way to obtain 100% control is through one of the methods described in question 2.1 above. Israel does not countenance the two-step "tender offer followed by squeeze out of minority". If the initial tender offer does not achieve a 95% positive response, then the bidder can only acquire 90% of the target's shares. If it does so and tries to do a squeeze out merger of the remaining recalcitrant shareholders, it is faced with the voting requirements described in question 2.15 above; i.e., the merger must be supported by a majority of the shareholders excluding the shares held by the bidder. Thus, the same minority that frustrated the full tender offer can frustrate the subsequent merger. Note that the bidder cannot institute the merger process at all unless it had disclosed its intention to do so when making the original tender offer.

8 Target Defences

8.1 Does the board of the target have to publicise discussions?

In the case of a full tender offer, the board of the target is not involved. In the case of any other type of transaction, the board is required to act in the best interests of the company, and if the best interests of the company require bringing the proposed transaction to the shareholders for approval, then they are required to do so. However, the board may in the exercise of its business judgement determine that an offer need not be brought to the shareholders since it is not fair, beneficial or worthwhile to the company and its shareholders.

8.2 What can the target do to resist change of control?

Potential target companies concerned about hostile takeovers can enact a number of takeover defences, including:

- Staggered board of directors. Directors are divided into different classes, with only one third of the directors elected at each annual shareholder meeting, thus making it more difficult to replace the board of directors unless the acquirer obtains the requisite majority to amend the articles of association.
- "Poison Pill". The U.S. model poison pill arrangements, which permit the issuance of target shares to all parties other than the unwanted bidder, are not very common in Israeli companies, and it is not certain whether such arrangements are permitted under Israeli law.
- "Blank Cheque Preferred". Blank cheque preferred shares, which are under the control of the directors, may be included in the company's articles of association, but only for companies traded solely abroad. Companies traded on the TASE are only permitted to issue one class of shares.

In all cases, the directors must act in a manner consistent with their fiduciary obligations.

8.3 Is it a fair fight?

If the goal is to achieve 100% ownership of the target, then the deck is stacked against the offeror, since a 95% (or 98% in some cases) positive response is required. If the goal is to achieve control of the target, the playing field is more level, as directors are required to express their view as to the fairness of the proposal, and may negotiate to improve the proposal, but may not otherwise interfere with the bid process. For mergers, the playing field is a bit more level, as the target board of directors may be able to consider competing offers and negotiate better terms from the acquirer.

9 Other Useful Facts

9.1 What are the major influences on the success of an acquisition?

The outcome of the offer process is likely to be influenced by:

- the amount and type of consideration offered;
- retaining key employees;
- the proposed plans for the company following acquisition;
- obtaining the cooperation of the directors and officers of the target; and
- employing professional advisers.

9.2 What happens if it fails?

A bidder can condition its bid on the achievement of full ownership, and thus avoid a situation where it bid is not fully successful and the bidder finds itself with less than 100% of the shares of the target.

10 Updates

10.1 Please provide a summary of any relevant new law or practices in M&A in Israel.

All recent amendments to the law are included in the above discussions.

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Barry Levenfeld is a senior partner at Yigal Arnon & Co., one of Israel's leading law firms. He has represented numerous international companies, including IBM, eBay, Oracle Software, Deere & Company. France Telecom, Medtronic and Boston Scientific, in the acquisition of Israeli companies. His practice also includes private equity fund formation and portfolio investment, as well as representation of technology and life science companies, from establishment through public offering and beyond. Mr. Levenfeld is a graduate of Harvard College (1976) and Harvard Law School (1980), and a Senior Lecturer in corporate finance at the Law Faculty of the Hebrew University in Jerusalem. He speaks and writes on issues related to M&A, biotechnology, computer software contracting and venture capital. He also serves on the Board of the Alyn Hospital, a pediatric and adolescent rehabilitation centre.

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