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TWISTERS: A WHIRLWIND YEAR OF M&A IN 2024 AND WHAT TO EXPECT IN 2025

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After two years of decreasing M&A activity, expectations were high that 2024 would be a bounce-back year for a recovering M&A market.

Through the first 11 months of the past year, these expectations were largely met as worldwide M&A activity totaled $2.7 trillion, an increase of 11% compared to the same period in 2023. However, this $2.7 trillion in value was only produced from roughly 44,000 announced transactions, a decrease of 18% compared to the same period in 2023, and an eight-year low in terms of deal volume. In other words, aggregate deal value increased while deal volume fell. This was because the market was buoyed by mega deals, with 28 deals exceeding $10 billion.

Much of this increase came from deals in the United States, where $1.6 trillion, or 59% of the deal value, originated, as well as Europe, where about $570 billion in deal value originated (reflecting an increase of 11% in European deal value as compared to 2023).

Additionally, after a slow start in the first quarter, M&A activity backed by private equity funds ("PE") finally picked up with PE deploying substantial levels of dry powder, resulting in an uptick for PE M&A activity through the first nine months of 2024. PE acquirers accounted for 24% of total M&A activity by deal value during the first nine months of 2024, up from 20% during the first nine months of 2023. The overall value of PE transactions reached $547.9 billion, an increase of 40% compared to the same period in 2023, reflecting not only the strongest first nine months for PE dealmaking in two years, but the fourth-largest opening period for PE M&A activity since records began in 1980.

Although the first 11 months of 2024 included a marked increase in M&A activity as compared to the same period in 2023, the year was nevertheless characterized by uncertainty in the market in the shadow of the 2024 presidential election, strict governmental regulations and enforcement, regulatory changes, and shifts in Delaware law and jurisprudence.

A Real Pain: Navigating the Updated HSR Form Requirements

In June 2023, the Federal Trade Commission

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ENDNOTES:

[1]*Tornetta v. Musk*, *et. al*., C.A. No. 2018-0408-KSJM (Del. Ch. Dec. 2, 2024).

[2]88 A.3d 635 (Del. 2014).

HOW THE *MOELIS* DGCL AMENDMENTS MOVED DELAWARE AND CANADA (A LITTLE) CLOSER TOGETHER: WHAT U.S. PRIVATE EQUITY AND VENTURE CAPITAL SHOULD KNOW

By Neil Kravitz, Grant McGlaughlin, Brendan Sawatsky, Brad Schneider and Paul Blyschak

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2024 was an eventful year for stockholders under Delaware corporate law.

Perhaps most notably, on August 1, 2024, the Delaware General Corporation Law ("DGCL") was amended to abrogate various earlier Court of Chancery rulings that many U.S. lawyers considered inconsistent with market practice. Among these were amendments addressing the decision in *Moelis & Company*,[1] which held that relatively common stockholder agreement clauses granting investors broad "pre-approval" or "veto" rights were invalid under the DGCL for substantially restricting the board's ability to manage the corporation's business.

What U.S. private equity and venture capital investors in Canada will be interested to know is that the *Moelis* amendments move Delaware and Canadian corporate law closer together, although several significant differences still remain. Given that Canada is routinely among the largest foreign destinations for outbound U.S. investment, we explore these similarities and differences for the benefit of U.S. counsel.

Moelis and the Ensuing *Moelis* DGCL Amendments

At issue in *Moelis* were a set of clauses that had been considered "market-standard" for some time and that are regularly found in Delaware stockholder agreements.[2] These provisions required the prior written approval of the company's founder before the corporation could take various actions. In *Moelis* the court held these were invalid for conflicting with DGCL s.141(a), being the section of the DGCL that establishes the "board-centric framework" at the heart of Delaware corporate law.[3] Moreover, the Court of Chancery stated that even if written as "veto rights" rather than "pre-approval rights," the result would be the same as "the power to review is the power to decide."

Widespread concern immediately ensued. Practitioners worried the ruling would not only fundamentally disrupt established market practice but also prompt a wave of "copycat" stockholder litigation attacking many similar agreements out in the market. The Delaware General Assembly responded by passing legislation adding new section 122(18) to the DGCL. This permits corporations to take (or not take) actions identified in a stockholder agreement, including providing stockholders with consent or veto rights over such actions, provided they do not override any requirements imposed by the DGCL or the corporation's charter.[4] That said, the legislative commentary to s.122(18) expressly cautions that this section "does not relieve any directors, officers or stockholders of any fiduciary duties they owe to the corporation or its stockholders. . ."

The *Moelis* DGCL Amendments and Canadian Corporate Law Compared

So how have the *Moelis* DGCL amendments brought Delaware and Canadian corporate law closer together? Most significantly, Canadian federal and most provincial corporate statutes have expressly provided that the duties of directors to manage or supervise the management of

the corporation's business is subject to the terms of any unanimous shareholder agreement ("USA").[5] The enforceability of the type of shareholder "pre-approval" and "veto" rights at issue in *Moelis* have therefore not raised similar controversy in Canada.

Where the *Moelis* DGCL amendments and Canadian corporate law diverge, however, is regarding the *transfer* of directors' duties. As mentioned, the legislative commentary to DGCL s.122(18) expressly cautions this section "does not relieve any directors, officers or stockholders of any fiduciary duties they owe to the corporation or its stockholders. . ." By contrast, Canadian federal and provincial corporate statutes expressly provide that, to the extent a USA restricts the powers of directors to manage the corporation's business, then: (1) the shareholder(s) granted such authority shall *assume* all the rights, duties and liabilities of the directors, and (2) the directors are *relieved* of such rights, duties and liabilities to the same extent.[6]

The *Moelis* DGCL amendments therefore create the possibility, depending on the circumstances, of fiduciary duties simultaneously lying at two different levels. First, at the level of the directors and, second, at the level of a controlling or majority shareholder. Canadian corporate law regarding USAs, by contrast, institutes an "either/or" structure where fiduciary duties, at least with respect to certain actions, will either lie with the directors or with one or more shareholders, depending on the circumstances, but not with both.

The twist in Canada is that because of a lack of judicial treatment of the issue, it is unclear exactly when that line will be crossed, *i.e.*, when a USA will be deemed to restrict the power of the directors to manage the corporation's business such that the rights, powers and liabilities of the directors transfer to the empowered shareholder. That said, because it is not unusual for Canadian courts to look to Delaware caselaw for guidance, particularly in M&A and corporate governance disputes, we at FASKEN have mused elsewhere that the *Moelis* decision could factor significantly into a Canadian court's reasoning on similar disputes in Canada.[7]

A related discrepancy between Delaware and Canadian corporate law that U.S. investors should appreciate relates to the ability to contract around directors' fiduciary duties and Delaware's greater allowance for private ordering. DGCL s.102(b)(7) permits a "charter provision to eliminate [a director's] monetary liability for breaches of the duty of care." DGCL s.122(17) allows for corporate opportunity waivers and thus the ability to circumscribe the reach of the duty of loyalty.[8]

Canadian corporate law leans heavily in the opposite direction. Canadian federal and provincial corporate statutes expressly provide that "no provision in a contract, the articles, the by-laws or a resolution relieves a director or officer from the duty to act in accordance with [corporate law] or relieves them from liability for a breach thereof."[9] The Supreme Court of Canada has also ruled that fiduciary duties in Canada are "pervaded" by a "strict ethic" and should be "strictly applied."[10]

The material exception to the foregoing are under the Alberta *Business Corporation Act* ("ABCA").[11] In 2022, the ABCA was amended to adopt, near verbatim, Delaware's corporate opportunity waiver under DGCL s.122(1).[12] The ABCA also expressly provides that, in deciding whether a particular course of action is in the corporation's best interests, a nominee director may give special, but not exclusive, consideration to the nominating shareholder's interests.[13]

Concluding Comments

Delaware and Canadian corporate law are similar in many respects, but also differ significantly on several key points. The *Moelis* DGCL amendments bring these similarities and dissimilarities into sharp focus. U.S. private equity and venture capital investors into Canada should appreciate these nuances, and structure and manage their investments accordingly. In particular, they should be mindful that, while Canadian corporate law allows stockholder "pre-approval" and "veto" rights of the sort blessed by the *Moelis* DGCL amendments, such clauses can in Canada have the result of transferring fiduciary duties to a stockholder, even in the case of a minority investment.

ENDNOTES:

[1]*See West Palm Beach Firefighters' Pension Fund v. Moelis & Company*, C.A. No. 2023-0309-JTL (Del. Ch. Feb. 23, 2024).

[2]*See* C. Davis, A. Fabens, J. Lapitskaya and J. Robinson, "Delaware Court of Chancery Invalidates Consent Rights and Certain Designation-Related Rights in a Stockholder Agreement," *The M&A Lawyer*, Vol. 28, No. 3, March 2024, p. 1.

[3]DGCL s.141(a) reads: "The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation."

[4]DGCL s.122(18) reads, in part: "Notwithstanding § 141(a) of this title, make contracts with 1 or more current or prospective stockholders (or 1 or more beneficial owners of stock), in its or their capacity as such, in exchange for such minimum consideration as determined by the board of directors (which may include inducing stockholders or beneficial owners of stock to take, or refrain from taking, 1 or more actions); provided that no provision of such contract shall be enforceable against the corporation to the extent such contract provision is contrary to the certificate of incorporation or would be contrary to the laws of this State (other than § 115 of this title) if included in the certificate of incorporation. Without limiting the provisions that may be included in any such contracts, the corporation may agree to: (a) restrict or prohibit itself from taking actions specified in the contract, (b) require the approval or consent of 1 or more persons or bodies before the corporation may take actions specified in the contract (which persons or bodies may include the board of directors or 1 or more current or future directors, stockholders or beneficial owners of stock of the corporation), and (c) covenant that the corporation or 1 or more persons or bodies will take, or refrain from taking, actions specified in the contract (which persons or bodies may include the board of directors or 1 or more current or future directors, stockholders or beneficial owners of stock of the corporation)."

[5]*See Canada Business Corporations Act*, RSC 1985, c C-44 (CBCA) at s.102(1): "Subject to any unanimous shareholder agreement, the directors shall manage, or supervise the management of, the business and affairs of a corporation." *See also* (Ontario) *Business Corporations Act*, RSO 1990, c B.16 (OBCA) at s.115(1) and (Alberta) *Business Corporations Act*, RSA 2000, c B-9 (ABCA) at s.101(1).

[6]*See* CBCA s.146(5): "To the extent that a unanimous shareholder agreement restricts the powers of the directors to manage, or supervise the management of, the business and affairs of the corporation, parties to the unanimous shareholder agreement who are given that power to manage or supervise the management of the business and affairs of the corporation have all the rights, powers, duties and liabilities of a director of the corporation, whether they arise under this Act or otherwise, including any defences available to the directors, and the directors are relieved of their rights, powers, duties and liabilities, including their liabilities under section 119, to the same extent." *See also* OBCA s.108(5) and ABCA s.146(7).

[7]*See* A. Marks, M.C. Valois, B. Schneider, B. Sawatsky, C. Ragas, G. Gujral and P. Blyschak, "When Might Shareholders Attract Fiduciary Duties Under a Shareholder Agreement? Guidance from Delaware Relevant to Private Equity and Venture Capital in Canada" (Oct. 23, 2024), available at www.fasken.com.

[8]DGCL s.122(17) reads: "Every corporation. . . shall have power to. . . [r]enounce. . . any interest or expectancy of the corporation in, or in being offered an opportunity to participate in, specified business opportunities or specified classes or categories of business opportunities that are presented to the corporation or 1 or more of its officers, directors or stockholders."

[9]CBCA at s.122(3). See also OBCA s.134(3) and ABCA s.122(3).

[10]*Canadian Aero Service Ltd. v. O'Malley*, 1973 WL 143378 (Can. 1973).

[11]RSA 2000, c B-9. For further discussion, *see* S. Gingrich, B. Schneider, G. McGlaughlin. C. Rose and P. Blyschak, "Delaware's Corporate Opportunity Waiver Comes to Canada: Takeaways for U.S. Private Equity and Cross-Border M&A," *The M&A Lawyer*, Vol. 27, No. 9, October 2023.

[12]*See* ABCA s.16.1(1): "Subject to the regulations, a corporation may waive any interest or expectancy of the corporation in or to, or in being offered an opportunity to participate in, a specified business opportunity or specified classes or categories of business opportunities that are offered or presented to the corporation or one or more of its officers, directors or shareholders."

[13]*See* ABCA s.122(4): "In determining whether a particular transaction or course of action is in the best interests of the corporation, a director, if the director is elected or appointed by the holders of a class or series of shares or by employees or creditors or a class of employees or creditors, may give special, but not exclusive, consideration to the interests of those who elected or appointed the director."