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Does Using English Law Give an Investor 100% Protection?

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It is well known by now that most Russian M&A transactions, especially private equity deals, are governed by English law.

One may wonder why this is the case, but the answer is already quite clear:

English law is much more flexible and convenient for the purpose of complex corporate transactions;

Russian law does not allow the use of certain instruments that are very important, almost critical, for the purpose of M&A deals — e.g. the waiver of a right, the possibility for a transaction to be dependent on whether or not certain conditions are met (including those that must be followed by the parties to the agreement), representations and warranties given by the seller with respect to the shares/assets sold, etc.;

English law allows the parties in the transaction to execute flexible and transparent shareholders agreements;

Finally, the English court system is widely regarded as more effective than the Russian equivalent.

The latter argument is one of the strongest and is frequently used both by investors doing M&A deals and foreign advisers working on English law issues.

Yet, the question arises: Are investors really secure when they use English law for Russian M&A transactions and intend to settle any disputes arising out of the deal in the London Court of International Arbitration (LCIA)?

From our point of view, it's difficult to answer "yes" unequivocally because LCIA proceedings are ridiculously time-consuming.

For certain deals, timing is absolutely crucial. To illustrate this, we could use the example of a typical private equity transaction where an investor is a minority shareholder who does not have full operational control over the company portfolio. If something goes wrong and the principal owner of the business is in material breach of the shareholders agreement, then every single day of delay in obtaining and enforcing a court decision can cause serious losses to the investor (which will be extremely difficult to recover at a later date).

Enforcing LCIA arbitral awards in Russia is an extremely complicated process.

It is quite standard for most of the seller's assets to be located in Russia in a Russian M&A deal. In practice, this means that, if after lengthy court proceedings in the LCIA you manage to obtain a positive arbitral award, you will most certainly face another significant problem — making sure that this award is actually enforced in Russia. And this is, without a doubt, an extremely complicated process.

Finally, arbitration in LCIA is quite expensive. It is sometimes even easier (and more reasonable) for the investor to write off certain damages or losses rather than to initiate arbitration proceedings.

In sum, we would like to stress once again that a potential investor should never view English (or any other foreign) law as the only possible instrument for a Russian M&A deal. Notwithstanding the fact that it has definite advantages over Russian law, there are still quite a few complicated issues that may prevent the investor from having sufficient comfort and protection.

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