USE OF ENGLISH LAW IN RUSSIAN TRANSACTIONS

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A. INTRODUCTION

Despite developments in Russian corporate legislation, the mergers and acquisitions (M&A) and international finance markets still heavily rely on English law for Russian deals. This booklet considers the main reasons for this and outlines some of the main benefits and disadvantages of using English law on such transactions. It also assesses the use of Russian law as a viable alternative in various different circumstances.

A speed-read summary table of the main differences between English and Russian law is also included at the end of this booklet.

English law is widely used in international transactions (often in conjunction with local laws) across a variety of jurisdictions, including on many deals in the Middle East, Africa, Singapore, Hong Kong, China, India, Russia and the CIS. In some cases this is for historical reasons, in others for practical reasons, or sometimes both.

English law has historical ties to former parts of the British Empire, including Canada, Cyprus, India, Australia and New Zealand and the legal systems of those countries today are still in part based on English law. Many Russian deals will involve Cypriot holding companies and English law fits very well with Cypriot corporate law, which is based on the old UK Companies Acts.

Both historically and currently, a number of major banks and financial institutions are head-quartered in London and so have logically insisted on English law when issuing financing documents. Financing documentation under English law is well developed and the interpretation and practice relating to this area of law is clear and well established.

The English language is, of course, also generally recognised as the main language of international business globally and is the main language of the internet.

B. THE KEY MERITS OF ENGLISH LAW

English law is a common law system, based on a combination of legislation and case precedent. English law is not set out in a single civil code. This approach has enabled English law to be flexible, adaptable and practical when dealing with the developing needs of commerce, as technology, evolving markets and new techniques all continue to revolutionise the ways in which we do business.

The principles of English law are clear and well established. With certain limited exceptions, businesses and their advisers have a lot of flexibility to agree to whatever terms they want on their transactions. The laws and rules themselves are less prescriptive when interpreting the intentions and actions of the parties and instead the courts will interpret what the parties have written in the contract. This makes it relatively straight-forward for businesses to transact and to understand clearly what their rights and obligations are under the contract, just by reading what is written in it. This is particularly helpful where one or more of the parties do not have English as their first language.

English courts and arbitration tribunals have a strong reputation for reaching fair, balanced and unbiased judgments and rulings and (on the whole) clear and predictable outcomes.

C. USE OF RUSSIAN LAW

The Russian Civil Code, which was originally influenced by the German Civil Code, is the main source of the civil and corporate laws in Russia. There are also a number of special Federal Laws dedicated to the incorporation and existence of legal entities and certain business affairs. Russian commercial and especially corporate law has rapidly developed over the past 20 years, following the end of the Soviet Union. The main distinction of the Russian law system from that of the common law countries is that historically, Russian law has not recognised court case precedent when interpreting provisions of the Civil Code and other Federal Laws. Nonetheless, the role of the high courts and especially of the Supreme Arbitrazh Court has been rapidly increasing within last few years, so that in practice its decisions are being treated as binding for other Russian courts dealing with similar disputes.

The Russian Civil Code was originally developed with consumer transactions and business-to-business trading of goods and services in mind. A lot of the principles can also be applied to corporate and finance transactions, but this was not what the legislators were principally aiming at and so this approach does not always perfectly fit the circumstances of each deal. It must also be remembered that for some 70 years Russia had a regulated economy, with state controlled commerce and no private ownership, and thus there is no established market practice or court precedent from that period to refer back to.

Russian law is also used on M&A and financing deals. Mainly, this is where the deal is between Russian parties only and does not contemplate any foreign element. Many legal practitioners in Russia regard the use of Russian law as obligatory in such circumstances, although this subject is still hotly debated. Many Russian state institutions and government organisations will insist on using Russian law where possible. We have also seen a definite move away from the past market practice of artificially introducing a non-Russian party to a deal (for example, to act as a guarantor) just in order to avoid using Russian law. Russian courts do not approve of such artificial steps and in these circumstances may disregard them and apply Russian law to the

contract anyway, with potentially difficult consequences for one or more of the parties where Russian law is not compatible with the particular terms of the contract.

However, international organisations outside of Russia are still often reluctant to rely on Russian law for their transactions and it is not yet widely recognised on an international level as a viable alternative to English law. There are still concerns in some quarters about using Russian courts and arbitration systems, the predictability of their rulings and the effectiveness of their enforcement actions.

Russian corporate law continues to improve and develop and this process is on-going. The clarifications and law changes in 2009 regarding shareholders' agreements were well publicised in the Russian legal market. However as will be seen below, for now at least, Russian law is not yet fully developed in some key areas of international M&A and finance deals.

D. SOME KEY LEGAL PROVISIONS ON INTERNATIONAL DEALS - A COMPARISON OF THE RUSSIAN AND ENGLISH POSITIONS

1. Representations, warranties and indemnities

English law position

Representations under English law are statements by one party which induce another party to enter into a contract. If the statement is untrue or incorrect the other party may be entitled to 'rescind' the contract, effectively unwinding it, and/or to claim damages. The aim of the damages is to put the innocent party in the position it would have been in had the false statement not been made, in other words, as if it had not entered into the contract.

Warranties are terms of a contract which, if breached, will entitle the innocent party to claim damages (but not generally to rescind or terminate the contract). The aim of these damages is different to those that may be awarded for misrepresentation: the contractual measure of damages aim to put the innocent party in the position it would have been in had the breach not occurred.

Warranties are used by a buyer or bank to obtain contractual statements and reassurances from the seller/borrower about the status of the target company and its business, assets, liabilities and financial position.

English law contracts offer a lot of flexibility when dealing with warranties. A warranty can relate to any event or possible future event (such as the reasonableness of a profit forecast), whether or not that event is within the control of a party to the contract.

Typically a buyer or bank lender will try to get both representations and warranties from a seller/borrower in the contract, in order to give itself maximum flexibility with its remedies if it needs to bring a legal claim.

Some examples of warranties:-

- "The Shares constitute the whole of the issued and allotted share capital of the Company".
- "The Accounts give a true and fair view of the assets and liabilities of the Company as at the Accounts Date and its profits for the financial period ending on that date".
- "The Company has no bank or loan facilities outstanding".
- "The Company has no outstanding liability to tax".

In certain situations, English law may imply terms into a contract, based on usage or custom, a previous course of dealing or the intention of the parties. In addition, certain statutes provide for terms to be implied into specific types of contract, such as contracts for the sale of goods.

Indemnities are agreements to compensate for loss arising from a particular liability and tend to be used where there is a known or potential, clearly identifiable liability, such as a tax liability, a potential environmental claim, or a specific issue arising from due diligence.

Unlike the usual position for warranties, **indemnities** under English law are not usually qualified or reduced by disclosures, or by the knowledge of the buyer and there is usually no duty on the part of the indemnified party to mitigate loss.

English law clearly recognises representations, warranties and indemnities. These are often essential on international finance and M&A transactions and many deals would be difficult to structure without them.

Russian law position

Russian law does not currently recognise indemnities as a legal concept.

With regards to warranties, there are some implied warranties under the Russian Civil Code in relation to the sale of assets (which could include the sale of shares) relating to title and unencumbered ownership and some basic assumptions about the quantity and the quality of the asset. However, these principles were aimed more at consumer transactions and are fairly limited in the context of an international finance or M&A deal. They cannot be altered or extended (or reduced) by contractual agreement between the parties. Under Russian law, a seller cannot be held liable for any false statements.

Fundamental issues such as protection for liabilities cannot currently be dealt with under Russian law warranties. Also, on a sale of shares in a company, the implied warranties under Russian law will only relate to the shares themselves and not to the title, ownership, condition, etc. of the underlying business and assets of the company to which the shares relate.

2. Calculation of damages for breach of contract

English law position

English law has some well-established rules for determining **damages for breach of contract**. Generally speaking (and in particular for breach of warranty) the courts will try to put the innocent party into the position it would have been in if the contract had been properly performed without the breach occurring. This will usually involve payment of damages by the breaching party, as financial compensation for the loss suffered from the breach. The innocent party will need to show a causal link between the breach and the loss suffered, the loss cannot be too remote a consequence of the breach and the innocent party should take steps to mitigate its loss.

Subject to this, a party can claim for both direct loss, which flows naturally from the breach, and also **consequential loss**, which is loss which does not flow directly from the breach, but which arises in special circumstances which are known at the time of entering into the contract and for which the party liable assumes liability (or can be expected to provide for). It is also possible under English law for a party to claim damages for **loss of profit**, sometimes even if this exceeds the amount originally paid under the contract. This can be an important provision on an M&A deal where the asset being acquired is of a high strategic value or is a key part of a larger project. The parties can also agree in the contract to exclude this ability to claim for consequential loss and loss of profit.

Parties can also agree to **'grossing-up'** provisions, where any warranty claim payment is made together with an additional amount to compensate for any tax or withholding that the claimant would otherwise incur on the payment.

Russian law position

Under Russian law the position is different. Generally speaking the buyer has two main rights in the event of a breach by the seller of the warranties implied by Russian law. Either it must return the asset in exchange for its money back (and potentially claim for compensation for its deal costs and expenses and so on), or it can demand a price reduction and rebate of part of its purchase monies, to reflect the actual state of the asset it has acquired.

Damages in respect of deal and advisers' expenses, loss of profit and consequential loss can be claimed under Russian law, but are difficult to prove in court. Russian courts are reluctant to compensate for large amounts of damages, especially those related to loss of profits and consequential loss. Grossing-up provisions would normally not be enforceable.

3. Purchase price/consideration - including deferred consideration and earn outs

English law position

Many international M&A contracts have complex systems for calculating the purchase price (consideration). Often this will include a **completion accounts** mechanism, whereby an audit of the target company and its business is conducted as at completion. The purchase price is adjusted once the assumed financial position (as presented by the seller to the buyer) is then tested against the actual results of the completion accounts process.

The completion accounts process will be set out in the contract and will include accounting assumptions and valuation methodology, a fixed agreed price for certain assets, assumptions in relation to the valuation of stock and work-in-progress, assumptions in relation to key financial indicators such as profits and revenues. It will also set out the process by which the completion accounts audit is carried out, whether expert accountants and valuers are involved, how the costs are shared, how the results are notified to the parties, how any disputed items are discussed and ultimately, if the parties cannot agree, how disputes are to be settled.

Contracts will sometimes also include **deferred consideration** payments at agreed stages after completion. These can sometimes be linked to **earn-out provisions**, which calculate future economic performance against agreed targets (such as revenue or profits) and then adjust the deferred payments according to whether or not these targets are met. The contract will often also include negative covenants and vetoes, to prevent one party from manipulating the trading business in order to produce anomalous or unsustainable short-term results which will affect the earn-out payment.

English law is well established in this area and many M&A contracts under English law will use some or all of these mechanisms.

Russian law position

Russian law is still developing in this area. Deferred consideration payments are certainly permitted. The Russian Civil Code does also permit parties to agree a price based on certain pre-determined assumptions, or according to a fixed formula. Thus in theory it could be possible to structure mechanisms such as completion accounts and earn-outs under Russian law. Taking this a stage further, it could in theory also be possible to use a 'price assumptions' mechanism as an alternative to English law warranties.

However, Russian law in this area has not yet been tested in the courts and there is no clear and defined case history to follow. The absence of years of tried and tested practice means that many parties would be nervous to be amongst the first test cases on this and it is likely that this area of Russian law will only slowly develop over time.

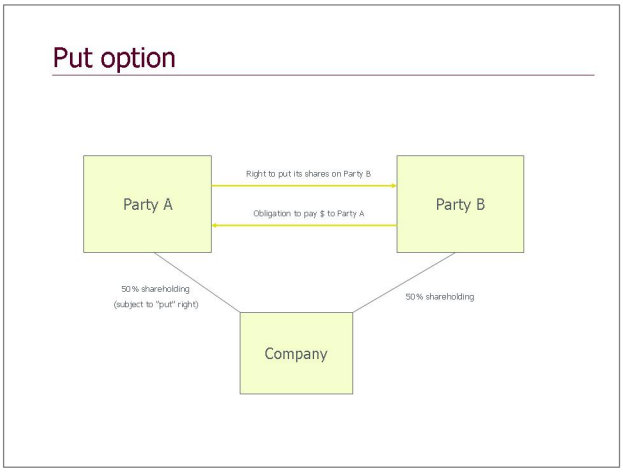
As will be seen below, the use of negative covenants and vetoes during an earn-out period would not be possible under Russian law.

4. Put and call options

English law position

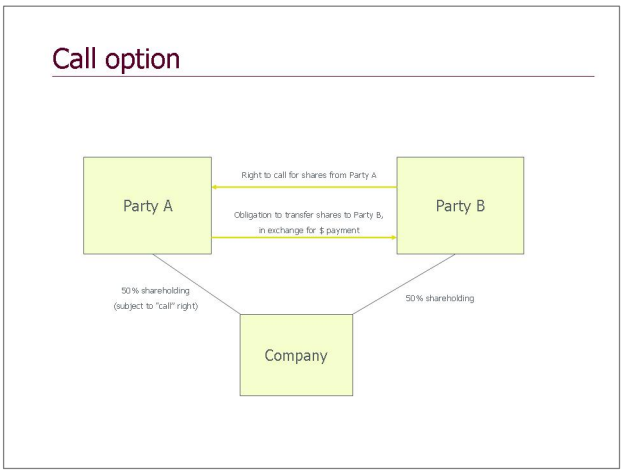
A **put option** under English law is a right for one party to transfer (in order words to 'put') its shares (or other assets) on to another party, by means of a compulsory sale and purchase. If the put option holder (i.e. the current holder of the shares) exercises its 'put' right, then the grantor of the put option is obliged to acquire the shares.

The put option agreement will deal with the key terms of the option, such as the price payable for the shares and the conditions and circumstances under which it can be exercised. Those circumstances may include where one party has failed to comply with its obligations under a shareholders' agreement.



A **call option** under English law works in the same way, but in this instance it is the call option holder who has the right to demand the sale and transfer of the shares from the grantor (i.e. from the current holder of the shares).

The call option agreement may provide that if the grantor refuses to transfer the shares, then the call option holder has an irrevocable power of attorney to sign the transfer on behalf of the grantor (as its attorney), to deal with the formalities of completion and to hold the purchase price on trust, unless and until the grantor of the call option is prepared to acknowledge and accept the transfer.



Put and call options are often used on joint ventures, M&A deals and financing structures, particularly where there are off-shore holding companies. Often they will be used to give an exit strategy for one or more of the parties or as an enforcement mechanism on default under shareholders' agreements, particularly where there are concerns about trying to enforce directly against assets in Russia.

Russian law position

The Russian Civil Code does not directly recognise put and call options. Russian law does recognise the concept of conditional sale and purchase agreements, but this is a two-way obligation which means that, once the conditions are satisfied, both parties are obliged to complete the sale and purchase. Often a key commercial element of put and call options is that only one party decides whether to trigger its option to 'put' or to 'call' and Russian law is not yet compatible with this concept.

Russian law recognises powers of attorney, but these cannot be irrevocable and can be cancelled by the grantor at any time. The attorney appointed under Russian law would also owe duties to the grantor of the power of attorney which are likely to conflict with the attorney's use of its powers to force through a sale against the wishes of the grantor.

5. Conditions precedent

English law position

Conditions precedent are clauses which provide that certain parts of the contract will only come into force if and when agreed conditions are met.

On an M&A deal these conditions might include obtaining anti-monopoly merger approvals, bank consent or change of control approvals from key customers and suppliers. On a finance deal these will include implementing agreed security packages and providing legal opinion letters.

Under English law, the parties can agree to whatever conditions they like for the contract to complete. These conditions do not need to be within the control of the parties and do not even need to be realistic, provided they are clear and can be objectively assessed.

Some examples of conditions precedent include:-

- "The unconditional approval of the Russian Federal Anti-Monopoly Service for the transaction".
- "The borrower obtaining the following written change of control consents…..".
- "The Investment Committee of the investor unconditionally approving the transaction".

Russian law position

Russian law does recognise **conditional contracts**, but the conditions must be outside of the control of the parties. Any condition that is within the control of a party is likely to be automatically deemed satisfied. This could create problems on some finance and M&A deals, where conditions relating to Investment Committee approvals, Credit Committee approvals, board and shareholder approvals could all be argued to be within the control of one of the parties, depending on the nature of the party and its corporate structure. Some more subjective conditions, such as the availability of funding, satisfactory due diligence results, or no material adverse change, would also be grey areas for interpretation and argument.

In addition, the prevailing view is that under Russian law the whole contract must be conditional (where conditions are used) so that, if the conditions are not satisfied, the contract is never formed. This is problematic for a lot of international finance and M&A deals, where the contract is formed at the point of exchange of contracts (i.e. on signing) but only completed (i.e. closed) after satisfaction of the conditions. It is usually key for the parties that they have a legally binding contract in this interim period from signing, to deal with matters such as confidentiality, exclusivity, costs and break fees, warranties and undertakings, conduct of the business pending completion and undertakings to endeavour to fulfil the conditions themselves.

In theory this issue could be structured around, with a legally binding preliminary agreement and annexed agreed form contracts to be entered into at completion, but this is not an ideal arrangement and could be open to attack in the courts.

6. Covenants - including negative covenants and veto rights

English law position

A **covenant** under English law is an agreement or promise from the covenantor to do or refrain from doing something, binding on the person who gives it.

A example of a **positive covenant** is:-

- "To provide key financial information to the bank on request".
- An example of a **negative covenant** is:-
- "Not to grant new security without the prior consent of the bank".

A **veto right** is the right of a party to unilaterally stop something from happening. This is similar to a negative covenant.

Covenants are essential on financing deals and most banks and institutional investors would not consider lending without them. The most common are financial covenants (tests of solvency and so on) and non-financial covenants and restrictions on how the borrower's business is run.

Covenants and vetoes in respect of the running of the business are widely used in English law shareholders' agreements and joint ventures. They are also used on M&A deals, particularly where there is a delay between signing and completion, or where there is a deferred element of the purchase price, or a performance (earn-out) payment post-completion.

Some typical vetoes include:-

- "Not to create, issue, grant or extend any mortgage, charge, debenture or other security".
- "Not to incur aggregate capital expenditure in excess of $[10,000] per annum".
- "Not to alter the terms of employment (including remuneration and benefits) of any employee".
- "Not to create or issue share capital or grant an option in respect of share capital".

Russian law position

Russian law is still developing in this area and there is no clear and defined case history for the courts to follow on a consistent basis. Positive covenants, such as to provide key financial information, should be enforceable as they are treated as an obligation by the courts. However, negative covenants in most of the cases are not permitted and the general principle applied by the courts is that a party cannot waive or contract out of its right to do something.

It is common under English law for shareholders to agree to procure (by use of their voting rights and other powers of control) that the company in which they hold shares will do or not do something. This idea is not recognised under Russian law and it is likely that it would not be enforceable, since the action/inaction relates to a third party (the company) and not the shareholders themselves.

Rewording a negative covenant, so that it is drafted in the contract in positive terms (for example:- "I agree to keep bank security at current levels", instead of "I agree not to grant new security") would not be enforceable. Russian law takes a substantive approach here, looking at the actual effect of the clause and not just whether it is worded as a positive or negative statement.

7. Restrictive covenants

English law position

Restrictive covenants under English law are non-compete and protective undertakings given in relation to a business to be protected. They are very common on joint ventures, private equity deals and on the sales of companies and businesses. Typically they would cover general non-competition with the business in question, together with non-poaching undertakings in relation to key staff, suppliers and customers. Under English law they must be restricted in time and scope to be effective and enforceable and must be a genuine attempt to protect the business.

Often the immediate remedy for breach of covenant is to seek a court injunction, to prevent the breaching party from continuing to compete in breach of their contractual obligations. This will then be followed by a financial claim for damages.

Russian law position

The widely held view is that restrictive covenants are not enforceable under Russian law, for the reasons mentioned above, namely that a party cannot waive or contract out of its right to do something under Russian law. They would also conflict with the basic right to work under Russian employment law and may also be illegal under Russian anti-monopoly legislation.

In addition, injunctions are not recognised under Russian law and the Russian courts have no rights to grant them or to enforce injunction orders granted outside of Russia.

Sometimes investors will insist on restrictive covenants at an off-shore level, under English law, in respect of a Russian business. The point has not yet been tested in the courts, but the general view is that such covenants would not be enforceable in respect of the Russian-based elements of the business. Often they are just included anyway, in order to apply moral pressure on the covenantor to act in accordance with the spirit of the agreement.

8. Drag along and tag along

English law position

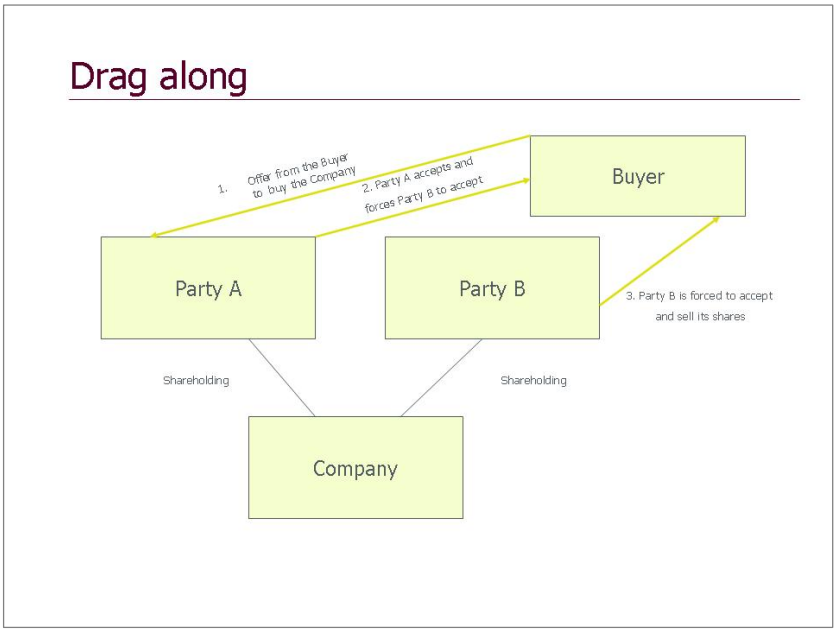
Drag and tag along provisions are widely used on international M&A deals, particularly in the context of joint ventures and private equity investments.

A **drag along** allows a shareholder of a company (usually a majority shareholder or institutional investor) to force the remaining shareholders to accept an offer from a third party to purchase the whole company, where the majority shareholder has accepted that offer. The other (usually minority) shareholders are then 'dragged along' and forced to sell their shares at the same time and at the same price per share.

The idea is to give liquidity and an exit route to the majority shareholder/institutional investor for its investment, on the assumption that most buyers will want to acquire 100% of the company and not be left with a (potentially uncooperative, or even hostile) minority shareholder group.

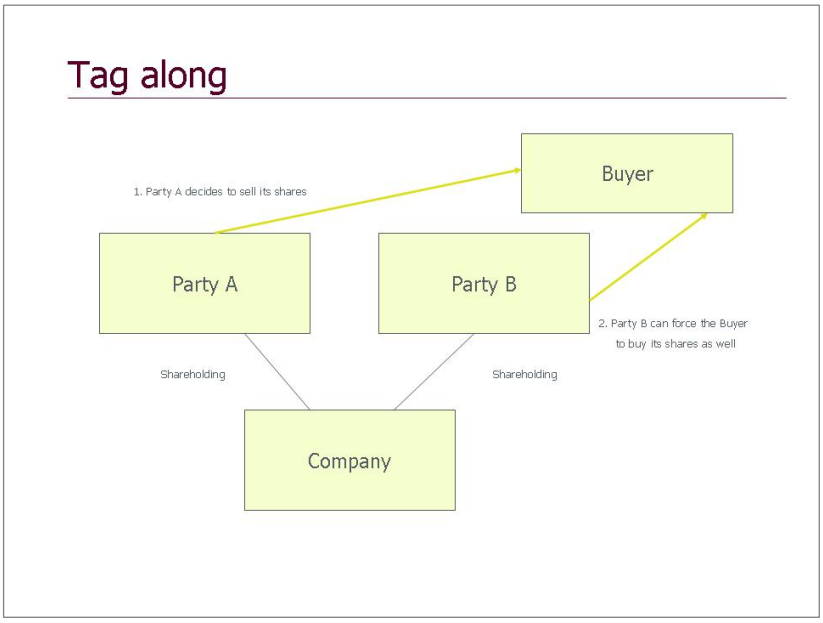
Usually, drag-along offers must be from genuine third parties, unconnected to the majority shareholder and acting on arm's-length commercial terms. The offer may also need to match or exceed a minimum agreed price or minimum time period before the drag along can be triggered. The minority shareholder may also be given a limited time period in which to match the offer and buy the majority shareholder's shares itself. The drag along provisions sometimes also state that the price may only be in cash, payable up front at completion (and not, for example, in non-cash consideration such as shares or loan notes, and not via deferred consideration or an earn-out).

Drag along provisions under English law may include irrevocable powers of attorney (as with put and call options) authorising the attorney to sign the share transfer on behalf of the 'dragged' shareholder, dealing with the formalities of transfer and holding the purchase price on trust for the dragged shareholder, unless and until it is prepared to cooperate with the sale.



A **tag along** is similar but enables certain (usually minority) shareholders to force the other (usually majority) shareholders who wish to sell their shares to a third party, to first procure an offer from the third party for all the shareholdings in the company at the same price per share, before any shares can be sold. The minority shareholder then 'tags along' with the majority shareholder's sale.

Typically these provisions are included in the constitution of the company and will state that, if the third party offeror does not agree to buy all the shares in the company, then its attempt to buy any of the shares is not valid and will not be registered.



Russian law position

Russian law has not yet developed concepts of drag along and tag along and there is no clear and defined case history to follow on a consistent basis. As mentioned in the section on put and call options, Russian law also does not currently recognise irrevocable powers of attorney.

9. Retention accounts and escrow arrangements

English law position

Retentions are amounts that are held back from the purchase price payable at completion, usually in order to secure the obligations of the seller under a post-completion undertaking, a condition subsequent, or in relation to the warranties and indemnities. Typically this money would be placed in a retention account which is jointly controlled by the seller and the buyer (or their respective lawyers) and can only be released in accordance with the provisions of the contract. If there is a dispute and the parties cannot agree, then the money stays in the account and the matter is referred to court or arbitration.

Escrow arrangements are similar to a retention account, but instead the money is deposited with a third party, who holds it **'in escrow'** for the parties and only releases it in accordance with the terms of the escrow contract, or if there is a court order. Escrow arrangements are widely used on international deals when signed (but undated) completion documents, security instruments and original share and title certificates are deposited with an escrow agent and then released when the completion monies transfer is made and the transaction has completed.

Russian law position

Russian law does not currently recognise escrow arrangements. Retention accounts could in theory be structured within Russian law, but again there is no clear and defined case history to follow here.

10. Good leaver/bad leaver provisions

English law position

Leaver provisions are a contractual mechanism covering employees who are also shareholders in a company. Under these provisions, when an employee leaves the employment of the company, he/she is required to transfer his shares back to the company (or as the company directs - for example, to a new incoming employee who is replacing him/her).

Leaver provisions are usually used for senior management employees and directors who have been given shares at a discount to market value, in order to incentivise and reward them in the business. These provisions are often included in the articles of

association or constitution of the company (particularly for tax reasons), but can also be structured into a shareholders' agreement or even a side letter.

Usually the leaver provisions will distinguish between **"good" leavers** and **"bad" leavers**. There is no legal definition of good and bad leaver in English law and the parties are free to agree to whatever definitions they like.

Good leavers tend to receive market value for their shares, whereas the price paid to bad leavers tends to be heavily discounted (often just nominal value, or market value if lower). The contract will set out how market value is calculated and will often involve an independent expert's assessment if there is a dispute. Historically the company's auditors would be appointed as the expert, but market practice has moved away from this, due to auditors' concerns over allegations of impartiality and their litigation risk.

Typically a good leaver would be someone who has died, retired on retirement age or resigned due to genuine bad health.

A bad leaver would include someone dismissed for gross misconduct or dishonesty. In recent years, the market practice has also been to link 'bad' behaviour to a breach of the restrictive covenants, so that a departing employee who was initially 'good' can be converted to 'bad' if they then subsequently breach their restrictive covenants. If they have already been paid for their shares, then the company will seek to recover the over-payment as a debt (on the basis that they were given a 'good' leaver value, when in fact they should have only received a 'bad' leaver value).

There is often a third category, of "intermediate" leaver, if for example if someone resigns after an agreed period of service, or if their employment is terminated for redundancy reasons. There tends to be a lot of negotiation over the scope and definition of this third category, particularly in relation to termination of employment for performance reasons and the price that the departing employee then receives for his/her shares. Often the contract will include a **'vesting'** schedule, which over a period of time increases the percentage value (against market value) that the employee will receive, to reflect long service and built-up value.

As with call options and drag along rights, an irrevocable power of attorney from the employee shareholder in favour of the company (or its officers) is often used in order to secure the obligations of the employee shareholder and ensure that the compulsory transfer takes place.

Sometimes employees will also negotiate for outright 'ownership vesting' provisions, so that they can keep an agreed proportion of their shares even after they have departed, with the proportion depending on their prior years of service at the point they leave and also whether they are a 'good', 'intermediate' or 'bad' leaver. Normally the vested shares would be disenfranchised from voting whilst the ex-employee continues to hold them.

Good and bad leaver provisions are widely used on private equity investments, when an institutional shareholder wants to incentivise key management to stay with the business and perform well and wants to discourage them from leaving. They are also used on joint ventures with owner-managers and on management buy-ins and buy-outs.

Summary of possible good/bad leaver positions

Good Leaver	Intermediate Leaver	Bad Leaver
Death	Serious/permanent illness of spouse	Resignation prior to an agreed minimum period
Serious/permanent illness	Resignation after an agreed minimum period	Dismissal for gross misconduct
Retirement at retirement age	Dismissal on grounds of poor performance	Dismissal for fraud or dishonesty
	Redundancy	Breach of restrictive covenants

Russian law position

In theory, leaver provisions could be structured under Russian law through a conditional sale agreement, which will come into force if the good or bad leaver event takes place. However, Russian law, court and market practice are not yet developed in this area. It is also not clear to what extent these provisions would cut across Russian employment legislation and the position would need to be tested in the courts. As mentioned above, irrevocable powers of attorney are not currently recognised under Russian law. Linking 'bad' leaver events to restrictive covenants would also not work under Russian law, given that they are unenforceable in Russia.

For these reasons, good and bad leaver provisions (when used) are almost always structured in shareholders' agreements and articles of association at an off-shore level, outside of Russia.

11. Share ratchets

English law position

Share ratchets are a legal mechanism in a shareholders' agreement or articles of association. Under the ratchet, the number of a shareholder's shares and/or the amount of consideration sale proceeds that he/she receives on an exit (sale or IPO) is increased or decreased ('ratcheted' up or down) according to an agreed performance formula.

The formula is agreed by negotiation between the parties and can be linked to the personal performance of the shareholder if they are an individual (although this can have tax issues). Alternatively they can be based on the overall performance of the company, or on the returns received by an investor.

A typical share ratchet would give senior management shareholders an additional share/consideration entitlement if the investor's IRR (**Internal Rate of Return** on its investment from dividends, interest, management charges and consideration sale proceeds) exceeds an agreed target amount. Sometimes ratchets are calculated pro rata to actual performance against targets. In other cases this can be stepped increases, with gateways between steps. Ceilings or caps on the ratchet amount are usual.

Example of a stepped ratchet

% of agreed target achieved	additional % of shares/proceeds
<100%	0
>100%-105%	0.5%
>105%-110%	2%
>110%	3%

Ratchets are less popular than they used to be and there are a number of tax issues to consider for the shareholders and the company, depending on the jurisdictions involved. However, English law is well established in this area and ratchets are still sometimes used on private equity investments and management buy-outs.

Russian law position

In theory, contracts governed by Russian law could be structured to replicate these concepts in particular through the execution of a conditional preliminary sale and purchase agreement, but again this has not yet been properly tested in the courts.

12. Deadlock mechanisms

English law position

Deadlock mechanisms are frequently included in joint ventures and shareholders' agreements, to deal with situations where there is no prospect of an agreement being reached between parties. They are widely used in English law contracts and there are many variations. A deadlock usually arises where the parties cannot agree on a key strategic business decision concerning the company and one or more parties have exercised their voting rights or vetoes in order to block further action, leading to a stalemate.

The main contractual mechanisms used are listed below by reference to their commonly used names, although these names do not have any implied legal terms under English law and so are still subject to the terms the parties actually agree in the contract. Again, irrevocable powers of attorney are often used in order to secure the obligations of the parties.

Texas Shoot Out - when both parties are interested in buying the other one out, each submits a sealed bid and whoever makes the highest bid buys the other party out at that price. Sometimes this will involve several rounds of bidding.

Russian Roulette - similar to Texas Shoot Out, but in this case one party names the price and the other party then decides if it is a buyer or a seller at that price. Set the price too low and you risk being bought out on the cheap; set the price too high and you risk paying too much for the other party's shareholding.

Dutch Auction - a type of auction where the auctioneer begins with a high asking price which is lowered until one party is willing to accept the auctioneer's price, or a pre-determined reserve price (the seller's minimum acceptable price) is reached. The starting price will be very high (higher than the seller genuinely expects to get) and is lowered in increments until someone bids.

Gin and Tonic - senior management of the respective organisations in dispute will sit down (perhaps over a gin and tonic!) to discuss the way forward. This is usually the first step in any attempt to remedy a deadlock situation.

In addition to this, other remedies can include reference to mediation or arbitration, expert determination, the use of put and call rights to buy out one party, or even the liquidation or break-up of the company, with its assets being sold and proceeds being returned to shareholders.

Russian law position

Russian law is still developing in this area and again it has not been extensively tested in the courts. Certainly some of the mechanisms should theoretically be possible to structure under Russian law. Others will be more problematic for reasons already mentioned, such as where put and call options are used or if irrevocable powers of attorney are required.

13. Penalties

English law position

A **penalty** under English law is an obligation to pay a sum of money in the event that a contract is breached, where that sum does not fairly reflect a genuine pre-estimate of the loss that will be suffered by the innocent party from the breach. For example:-

- "If you breach your obligation to transfer me an asset worth $5, you must pay me $1m".

In the example, on the face of it, there is a clear penalty, because the breach payment in no way reflects the loss that will be suffered from a failure to transfer the asset.

English law does not permit the use of penalties in contracts. Any such penalty provisions are void and unenforceable. However, it will generally also be necessary to show that the amount is excessive or unconscionable, that the primary purpose is to deter (rather than compensate) and that there is some form of oppression. It should be noted that where the parties are of equal bargaining power and are legally represented, the English courts have shown a reluctance to interfere, unless the sum involved is extravagant or unconscionable.

In commercial situations, the issue of penalties often arises with default interest on loans and also for break fees on deals where exclusivity undertakings are breached or a condition precedent is not satisfied. Bad leaver provisions are sometimes challenged as being penalties, if the transfer price is unreasonably low and effectively amounts to a penalty clause.

Under English law, the parties are permitted to agree on a **"liquidated damages"** provision, which will provide that in the event of a breach, the breaching party must pay an agreed sum which constitutes a genuine pre-estimate of their loss from such breach. The pre-estimate must be genuine at the time the contract is made. Here the courts will look at the substance of the contract and not just the wording, so they may still rule that an obligation is a penalty (and therefore unenforceable), even if it is not described as a penalty in the contract.

Russian law position

Unlike English law, **penalties** are permitted under Russian law. However, the courts require them to be reasonable and have the power to reduce them if they are not. In practice, Russian courts tend to disallow high penalties and the amounts paid are often relatively low.

This in practice means that the English and Russian law positions are not dissimilar, although under English law the courts will just strike out the whole penalty clause and will not adjust it with a lower, more reasonable, sum.

Penalties under Russian law are aimed at consumer transactions and business supply arrangements, where there has been a service or performance failure by one party. The widely held view is that they cannot be structured on M&A and finance deals in order to provide an alternative to warranties, indemnities and so on and that any attempt to do so would not be upheld by the courts.

14. Preferential share rights

English law position

Under English law, share rights may be structured so as to give one or more classes of shares a preferential treatment in respect of matters such as dividends, returns of capital and/or voting rights. These are usually referred to as **preference shares** and can be voting or non-voting. The specific preferred rights are agreed between the parties, subject to any company law requirements (such as sufficient profits being available to make preferred dividend payments).

These preferred share arrangements are very common for private equity deals, development capital investments and many joint ventures. Often they will involve many layers of different classes of share rights and are a key part of the financial structuring of the company.

Typically the arrangements will also be applied to shares in overseas holding companies where off-shore structures are used, with suitable adaptations to allow for local company law requirements.

Russian law position

Russian law offers less flexibility here. Generally speaking, membership interests in Russian **Limited Liability Companies** (LLCs) are all one class and all equal and cannot be altered by contractual arrangement. The Russian law on LLCs allows the grant of certain specific additional rights to some members, which must be clearly reflected in the company's articles. Unfortunately, there is not much market or court practice in this area and it is rarely utilised.

With regards to Russian **Joint Stock Companies** (JSCs) it is possible to have both ordinary shares and preference shares. This applies to both Open JSCs and Closed JSCs. Different types of preferred share are possible, with varying dividend entitlements and liquidation value. The preference shares are non-voting, other than in circumstances where dividends have not been paid (in which case they become voting preference shares).

With JSCs, ordinary shares are used as a tool for governance, in order to empower shareholders with decision-making. Preference shares are designed for capital raising, particularly where bank funding is not available.

15. Step-in rights

English law position

Often on private equity investments, the parties will agree to **step-in rights** or **swamping rights**. These are a contractual mechanism (usually also contained in the constitution of the company) which allows one party to 'step in' and take voting control of the board of directors and/or general meetings of shareholders.

The events which allow one party to step in and take control are subject to negotiation. Typically these include where the company is (or is likely to become) in default under its banking facilities, or where the other party is in breach of the shareholders' agreement.

Usually the step-in period will only last whilst the breach is on-going and in order to give the party who is stepping-in the opportunity to rectify the problems and to put in place measures to ensure that the breach does not reoccur. In the case of financial defaults, this may include the ability to raise fresh loan finance and grant new security, or to issue share capital on a non pre-emptive basis, thus diluting the defaulting shareholder.

Some examples of step-in triggers may include:-

- The bank facilities being in default (or likely to become in default).
- Interest on investor loan stock not being paid.
- Insufficient profits available to pay dividends on preferential shares.
- Material breach by a party under the transaction documents.
- In the case of an individual, material breach under their service agreement/contract of employment.
- More controversially - failure to hit agreed financial targets.

Russian law position

Russian law does not directly cover step-in rights.

With regards to Russian **Limited Liability Companies** (LLCs), the members' voting rights are entrenched in the membership interests and cannot be altered by contractual arrangement. With regards to Russian **Joint Stock Companies** (JSCs), the voting rights of the shares are entrenched at the outset and can only be transferred between the parties by an actual transfer of the shares themselves.

It is theoretically possible with JSCs to use preference shares as a mechanism for altering shareholder voting control, by not paying the dividends on them and thus causing them to automatically gain voting rights. However, this decision (not to pay the dividends) is within the hands of the ordinary shareholders and so could potentially be blocked by the defaulting party, if it has sufficient votes at ordinary shareholder level (and assuming that sufficient funds are available to pay the dividends). The legislation was also not intended for this purpose and so a contractual mechanism seeking to do this would be risky and subject to legal challenge.

At board of directors level for both LLCs and JSCs, it is also not possible to impose step-in rights. Directors may be nominated by one shareholder, but they are then elected to office by all shareholders and, once in office, have duties to act on an independent and unfettered basis. Directors are not permitted to act, or agree to act, in accordance with the instructions of one or more shareholders. They cannot delegate or transfer their voting powers (even under a power of attorney). In practice, shareholders do of course sometimes give unofficial directions and guidance to their nominated directors, but such arrangements are potentially in breach of Russian corporate legislation and are unlikely to be enforced.

In theory, step-in rights under Russian law can be structured through special provisions in a shareholders' agreement, in particular through an obligation of one shareholder to vote and act in accordance with the instructions delivered by another shareholder. However, the shareholders' agreement is a relatively new instrument under Russian law and has not yet been extensively tested in the courts.

16. Limited recourse

English law position

Under English law it is possible for a lender to make a loan to a borrower on a **'limited recourse'** basis (sometimes also called non-recourse). This means that in the event of default on the loan, the lender only has a limited claim against the borrower, usually only against an agreed asset which has been put up as security. So if the asset is seized and sold, but the proceeds of sale are insufficient to cover the full debt, the lender has no further recourse against the borrower.

These arrangements sometimes come up on project finance deals. The limited recourse arrangement may be permanent, or may transition to an unlimited recourse debt on the satisfaction of agreed events (such as construction of the project).

Russian law position

As a general rule, **limited recourse** arrangements are not recognised under Russian law and the borrower would remain liable for the outstanding balance of the debt.

17. Limitation periods

English law position

The standard limitation period for bringing claims for breach of contract is **6 years** from the date of the breach under English law. In the case of contracts executed as deeds, the limitation period is **12 years**.

The periods can be increased or reduced by agreement between the parties. On a typical M&A deal, the parties will agree to a period of 1-3 years for non-tax warranty claims. The period for tax claims tends to be much longer (e.g. 7 years) and is usually linked to the time in which the relevant tax authorities can themselves bring a claim in respect of a particular tax period.

Russian law position

The limitation period under Russian law for breach of contract is in general **3 years** from the date when the innocent party learns (or should have learned) of the breach. There are some specific exceptions, where the period is shorter. The periods cannot be increased or decreased by agreement between the parties.

18. Other limitations on liability

English law position

It is usual in English law contracts, particularly where warranties are being given, for parties to include other contractual limitations of liability. These can include:-

- Restricting warranties by reference to **materiality** (often with negotiations over what is meant by 'material').
- Restricting warranties by reference to the **knowledge** of the warrantor (often with negotiations over what is meant by knowledge, whether that includes imputed knowledge of employees and third parties, whether knowledge should include facts that the warrantor does actually not know, but would have known on making reasonable enquiries).
- An **individual** '*de minimis*' **threshold** minimum amount on each claim, before that claim can be brought.
- A **'basket' threshold** aggregate minimum amount for all claims, before any claims can be brought.
- An aggregate **financial cap** on all claims.
- Where there are multiple warrantors, a **proportional sharing** of liability amongst the warrantors by reference to the percentage of sale proceeds they themselves receive.
- Provisions allowing the warrantors to take **conduct of claims**, where third parties are bringing a claim which could in turn lead to a warranty claim.
- A **reverse-warranty** from the buyer/lender, confirming that they are not currently formulating a claim (sometimes called a **'no sand-bagging'** provision).

English law does not allow a party to exclude its liability for fraud. Any attempt to do this in the contract would be unenforceable and could potentially also render other provisions unenforceable, even though they would otherwise be enforceable for non-fraudulent acts (such as an honest mistake).

Russian law position

Again the position under Russian law is only theoretical here and has not yet been fully tested, particularly given the current position on representations, warranties and indemnities under Russian law.

It is possible that some of these limitation concepts could be structured, although great care would need to be taken to ensure that they did not cut across the general Russian Civil Code and its rules in relation to issues such as negative covenants and damages for breach of contract.

19. Reasonable and Best Endeavours

English law position

English law contracts frequently use the concepts of **reasonable** and **best endeavours** to describe the efforts that a party must go to in order to ensure that something outside of its direct control will occur. Their purpose is to soften absolute obligations. These terms are not defined in legislation and have instead developed via case law. However, there is still some debate as to their precise legal effect.

The general view is as follows:-

Reasonable endeavours - requires a party to take reasonable steps to achieve an objective, taking into account its own commercial considerations. This may only require it to follow one reasonable course of action.

All reasonable endeavours - a half-way point between reasonable endeavours and best endeavours, albeit one that probably requires a party to exhaust all reasonable courses of action available to achieve an objective (but again taking into account its own commercial interests).

Best endeavours - the strictest of the three. Although it is not an absolute obligation, it requires a party to take all the steps within its power that a reasonable person, acting in its own interests, would take to achieve an objective, even if that involves expending money or commercial sacrifice.

Some examples of reasonable and best endeavours:-

- "After completion, the Buyer will use **reasonable endeavours** to provide the Seller with tax and accounting information on the target business, to the extent it relates to the Seller's previous period of ownership."
- "The Seller will use **all reasonable endeavours** to ensure that its advisers keep the terms of this deal confidential".
- "The Borrower will use **best endeavours** to provide the information to the Bank within 14 days".

Russian law position

The Russian Civil Code does not currently recognise concepts of reasonable and best endeavours and Russian courts have not yet developed any consistent approach to such concepts.

20. Joint and several liability

English law position

Under **joint and several liability** a buyer/bank may pursue a claim against all or any of the warrantors/borrowers for the full amount of the claim. It is up to the warrantors/borrowers to agree amongst themselves on their respective proportions of liability to each other.

A party who pays more than his proportion of liability then has a **right of contribution** against the other warrantors/borrowers.

Russian law position

Russian law is more or less the same as English law here and recognises **joint and several liability** and **rights of contribution**.

21. Assignment

English law position

Generally speaking, English law allows a party to **assign its rights and benefits** under a contract (but not burdens and obligations) to a new party. To take full effect the assignment must be in writing and satisfy certain other legal requirements, such as written notification to the counter-party to the contract.

The default position under English law is that all rights and benefits may be freely assigned, although this may be restricted or prohibited by agreement between the parties.

Russian law position

Russian law is very similar to English law on assignment of rights.

22. Third party rights

English law position

In some cases, English law allows third parties who are not parties to a contract to enforce provisions in the contract which are beneficial to them. The third parties do not need to be specifically named, but they do need to be an intended beneficiary of the rights in question (and not just incidental). These provisions are often referred to as **third party rights**.

An example of this under M&A contracts is where a seller agrees with a buyer not to bring claims against its (now former) employees and directors.

Russian law position

Russian law is similar to English law, although the third parties must be expressly mentioned by name in the contract.

23. Dispute resolution and jurisdiction clauses

English law position

English law contracts can refer disputes to different forms of dispute resolution, such as mediation, alternative dispute resolution and arbitration. The choice of jurisdiction in which any dispute hearing will be held is also (generally speaking) a matter for agreement between the parties.

Russian law position

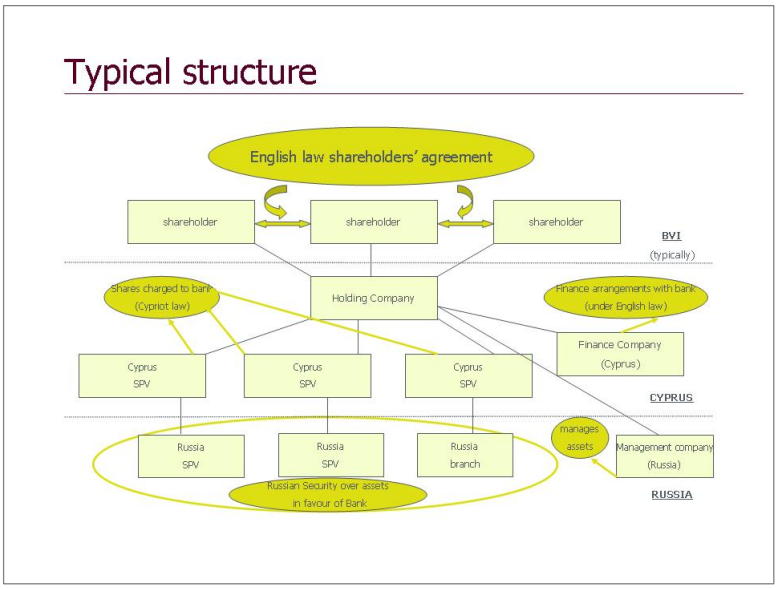
Russian law is the same and the parties are also able to select the form of dispute resolution and the jurisdiction for this in the contract. For dispute resolutions of Russian law governed contracts, the Russian state courts remain the most popular choice of venue. However, Russian based and international arbitration courts, such as, the International Court of Arbitration (ICC) and the London Court of International Arbitration (LCIA), are becoming more popular for such disputes, especially for M&A and finance transactions.

E. USE OF DUAL-STRUCTURES: RUSSIAN AND ENGLISH LAW COMBINED

A very noteworthy point to also consider is the widespread use of dual structures, which combine the best of English and Russian laws.

Our team widely uses both Russian and English law in combination on international transactions involving Russia and the CIS and often uses both laws together when structuring and implementing complex high value projects. Both laws have their advantages and when used effectively together, can be a powerful business tool for clients.

A popular and well used structure for Russian deals involves the use of an off-shore holding company (typically in Cyprus or the Netherlands), which in turn wholly-owns a Russian trading subsidiary. Typically there will be an English-law shareholders' agreement and financing documents at the off-shore level. Security under Russian law will be given by the Russian subsidiary in respect of its assets.



These structures can be very complex in nature and sometimes include cross-guarantees and off-shore collateral security, 'golden share' rights and put and call options at off-shore level.

There are some key points that must be covered with these structures, such as the maintenance and protection of the assets in Russia (including the security arrangements) and the ability to appoint and remove the General Director of the Russian trading subsidiary.

As mentioned earlier, it is inadvisable to introduce a foreign party to a Russian transaction, just in order to utilise English law. Such a step can be ruled as artificial by the Russian courts, who will instead apply Russian law anyway, with potentially problematic consequences for the parties where the contract is not compatible with Russian law.

F. WHY IS US LAW NOT MORE WIDELY USED ON RUSSIAN DEALS?

US law is of course also used for international transactions. However, the number of Russian and CIS deals using US law is very low compared to the number using English law.

The reasons for this are a matter for speculation. The fear factor of the US litigation process (with its potentially huge scale and costs) is frequently mentioned, along with concerns of becoming involved with US regulators (particularly after the introduction of Sarbanes-Oxley).

US legal drafting has also taken a different route to English law drafting and the style is more traditional and sometimes arcane, with longer sentences and much less punctuation. This can make it more difficult for the parties to easily read and fully understand their detailed rights and obligations, particularly if English is not their native language. Even English qualified lawyers sometimes complain about how confused they are by some US legal drafting!

G. SUMMARY CONCLUSIONS

The first conclusion to draw is just how far Russian corporate and finance law has come in such a relatively short period of time. Clearly there are still many areas for development and we see this taking place slowly but steadily over time, as parties become more familiar with and confident in the system and the courts themselves gain further experience and create a case history.

We mentioned at the start of this booklet that the Russian Civil Code was originally influenced by the German Civil Code, but that historically, court case precedent has not been recognised when interpreting provisions of the Russian Civil Code.

The German system does recognise warranties, which are not set out in the German Civil Code but have developed through court case precedent. It is likely that at some point the Russian system will adopt a similar approach and there are already discussions taking place at a high level about this. We are also already seeing in practice an increase in the use of decisions of the Supreme Arbitrazh Court as guiding precedents for other Russian courts. As this develops, it will be a significant step along the road towards fully developing some of the legal techniques and practices discussed in this booklet.

The common practice of Russian-only parties using Russian law, and the insistence of state organisations on using Russian law where possible, are also very helpful in creating momentum and track record and in building confidence in the system. Over time this will lessen the need for off-shore structures on many Russian deals.

International businesses will take longer to become completely comfortable in using only Russian law and this is likely to be a slower process of development. However, English law took some 600 years to develop into what it is today and so in the last 20 years Russian law has already made some huge steps in the right direction.

SUMMARY TABLE COMPARING ENGLISH AND RUSSIAN LAW POSITIONS

LEGAL CONCEPT	SUMMARY	ENGLISH LAW POSITION	RUSSIAN LAW POSITION
Representations	Statements which induce a party to enter into a contract.	Use is well established. Often expressly excluded on M&A transactions (other than for fraud).	Representations outside of the contract not recognised.
Warranties	Contractual statements or promises in a contract that confirm particular facts or circumstances.	Use is well established.	Basic warranties only, implied by law. Cannot be amended or extended. Do not apply to the underlying business and assets if buying shares. Liabilities cannot be warranted.
Indemnities	Agreements to compensate for a particular loss or liability.	Use is well established.	Not currently recognised.
Damages for breach of contract	Financial compensation payable to an innocent party for breach of contract by the other party, to compensate for loss suffered from the breach.	Use is well established. Subject to rules on causation, remoteness and mitigation. Damages for loss of profit and consequential loss are possible. Grossing-up provisions permitted.	Two main options available:- - unwind transaction and return purchase price (without costs, etc.); or - seek price reduction to reflect actual state of the asset. Damages for loss of profit and consequential loss are possible but can be difficult to prove. Grossing-up provisions not recognised.
Put options	The right for one party to sell its shares to another party for a pre-determined price.	Use is well established.	Use is not well established.
Call options	The right for one party to buy the shares of another party for a pre-determined price.	Use is well established.	Use is not well established. Irrevocable power of attorney not permitted.
Conditions precedent	Provisions stating that the contract (or certain parts of the contract) will only come into force if and when agreed conditions are met.	Use is well established.	Only permitted if the whole contract is conditional. Conditions must be outside of the control of the parties.
Covenants and veto rights	Contractual promise to agree to do, or not do, something, or to stop something from happening.	Use is well established.	Positive covenants permitted. Negative covenants and vetoes are unlikely to be enforceable.

Restrictive covenants	Non-compete undertakings given in relation to the protection of the business.	Use is well established, although unlikely to be enforceable in respect of Russian business, even if given at off-shore level.	Risk of being not enforceable and being deemed illegal.
Drag along	Mechanism allowing one shareholder to force the other shareholders to accept an offer for the company and sell their shares.	Use is well established.	Theoretically possible but not tested in the courts. Irrevocable power of attorney not permitted.
Tag along	Mechanism allowing shareholders to all sell their shares at the same time, where one shareholder has accepted an offer for its shares.	Use is well established.	Theoretically possible but not tested in the courts.
Completion accounts	Mechanism for adjusting purchase price following an audit of the company.	Use is well established.	Theoretically possible but not tested in the courts.
Deferred consideration	Deferred payments of the purchase price after completion, often linked to agreed triggers or targets.	Use is well established.	Use is well established.
Earn-outs	Deferred consideration based on achievement of agreed financial targets for an agreed period after completion.	Use is well established.	Theoretically possible but not tested in the courts. Negative covenants and vetoes during the earn-out period are unlikely to be enforceable.
Retention accounts	Joint account between a seller and buyer, holding part of the purchase price, to be released on the satisfaction of agreed conditions or to settle warranty claims.	Use is well established.	Retention accounts are theoretically possible but not tested in the courts.
Escrow arrangements	Arrangement to deposit title documents and/or completion monies with third party escrow agent, who then releases them once the completion conditions have been satisfied.	Use is well established.	Escrow arrangements are not currently recognised.
Good leaver/bad leaver provisions	Contractual mechanism obliging employee shareholders to sell their shares when they leave the company, for a set price depending on the circumstances of their departure.	Use is well established.	Theoretically possible but not tested in the courts. Irrevocable power of attorney not permitted. Linking 'bad' leaver events to the restrictive covenants would not be enforceable.
Share ratchets	Mechanism to increase/decrease the number of shares and/or amount of sale proceeds a shareholder receives, based on a performance formula.	Use is well established; less popular now, often due to tax issues.	Theoretically possible but not tested in the courts.
Deadlock mechanisms	Contractual provisions used to break a deadlocked decision between the parties, often	Use is well established.	Theoretically possible but not tested in the courts.

	leading to the buy-out of one of the parties.		
Penalties	Obligation to pay a sum of money in the event that a contract is breached, which does not fairly reflect a genuine pre-estimate of the loss.	Penalties are void and unenforceable. Liquidated damages are permitted.	Permitted but amounts need to be reasonable.
Preferential share rights	Rights for one class of (preference) shares to receive a more favourable treatment than ordinary shares in respect of dividends/returns of capital and/or voting.	Use is well established.	Not available for LLCs. Basic preference shares available for JSCs.
Step-in rights	Mechanism allowing one party to 'step in' and take voting control of the board and/or shareholder meetings. Right is triggered by agreed events of default.	Use is well established.	Theoretically possible but not tested in the courts.
Limited recourse liability	Limits a lender's right to claim under a loan to a specific agreed asset only.	Use is well established.	Not currently recognised.
Limitation periods (for breach of contract)	Time periods for bringing breach of contract claims.	6 years from the date of breach. 12 years for deeds. Can be reduced or increased by agreement.	(Generally) 3 years from the date the innocent party learns (or should have learned) of the breach. Cannot be reduced or increased by agreement.
Limitations on liability	Provisions restricting the ability of one party to bring a claim against the other.	Use is well established. Attempts to exclude liability for fraud or dishonesty are void and unenforceable.	Possible but with certain limitations.
Reasonable and best endeavours	The efforts that a party must go to in order to ensure that something outside of its direct control will occur.	Use is well established.	Not recognised under Russian law.
Joint and several liability	All parties are liable for the full amount of the claim and must agree contributions amongst themselves.	Use is well established.	Use is well established.
Assignment	Transfer of rights in a contract from one party to a new third party.	Use is well established.	Use is well established.
Third party rights	Third party who is not party to the contract may still enforce provisions beneficial to it.	Use is well established.	Use is well established; the third parties must be expressly named.
Dispute resolution and jurisdiction clauses	The form of dispute resolution for disputes under the contract and the jurisdiction of the dispute hearing.	Use is well established.	Use is well established.

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