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Contractual terms of M&As in Belarus

Use of Belarusian law requires creativity

In the previous articles of our three-part series about M&As in Belarus we described the economic and political framework, the specifics of the transaction process and the main transaction structures on the Belarusian M&A market. This last part focuses on the contractual terms of M&As in Belarus.

The content of agreements for M&As in Belarus can vary markedly depending on significance of the transaction and the sophistication of the parties. For a small-scale transaction between local parties, the acquisition agreement might fit on 3-4 pages and provide information about the disposed share, purchase price, payment terms, and several additional provisions. At the same time, **it is not uncommon to see complicated agreements often governed by foreign law** (49% of the cases). Below we summarise the main findings on contractual terms of M&As in Belarus from the Belarus M&A Deal Points Study published this summer by ten leading Belarusian law firms (including Sorainen, the Belarusian member of WTS Global).

Use of foreign law for M&As in Belarus

The use of foreign law for M&As in Belarus may be limited if the transfer agreement is subject to notarisation, registration, or other specific requirements. The notarisation requirement can be established in the target's articles of association, though this is rare nowadays. **If the notarisation is mandatory,** it is still possible to conclude the agreement under foreign law, but the **procedure is extremely complicated** and involves requesting a legal opinion regarding compliance with the applicable law.

Other situations when the use of foreign law is limited are transactions with shares of joint-stock companies. The shares are considered to be securities, and according to the common view, **transactions with securities may only be governed by local law**, at the very least with regard to mandatory provisions applicable to the transfer of the securities. Additionally, in terms of closed joint-stock companies, any mention of foreign law may complicate a mandatory registration with a professional participant of the securities market (i.e. a broker). For open joint-stock companies, the use of foreign law is even less viable as the transaction and transfer are carried out in the electronic system of the Belarusian Stock Exchange.

Cases requiring a specific approach

When drafting a contract governed by Belarusian law, **it is** generally **recommended to be as precise as possible**, especially if the parties would like to use legal instruments or concepts that are not directly (or sufficiently) regulated by law, e.g. representations and warranties, indemnity, earn-out, etc. Though all these instruments and concepts can be implemented within the boundaries of local law, it sometimes requires a specific approach to achieve the necessary result.

One such approach relates to the **drafting of purchase price provisions**. From a local perspective, the usual M&A term "adjustment" can easily be confused with an amendment of the contract, hence it is advisable to describe respective provisions as a calculation of the purchase price. Other purchase price specifics and payment provisions include the extremely low popularity of the locked box mechanism (used only in 6% of the cases) and notable use of payment deferrals (46% of the cases). The share of deferred payments is relatively high (in 74% of the cases more than 30% of the purchase price is deferred).

If the contract provides for **separate signing and closing** (79% of the cases), the parties usually make the closing conditional on the discharge of conditions precedent (84% of the cases). The conditions precedent tend to refer to corporate and regulatory formalities, but not to the accuracy of representations and warranties (25% of the cases). In almost half of the cases, the parties agree on a long-stop date, which usually (62% of the cases) does not last longer than two months.

Representations and warranties

Though **representations and warranties** are a frequent provision of contracts for M&As in Belarus (86% of the cases), they are not originally native to the Belarusian legal system. The matter did not use to be regulated at all, and representations and warranties were used on the grounds of freedom of contract or by applying more or less analogous instruments of local law. The situation changed after the amendments introduced by **Decree No. 8**, which **confirmed the right of Hi-Tech Park residents to use a warranty-like instrument** and established statutory remedies for a breach of this "warranty". It is expected that a similar rule will shortly be implemented in the Civil Code and will become available for everyone. Meanwhile, the remedies applicable in the case of a breach of warranties must be stipulated in the contract.

A different situation has been established with regard to representations. While the law allows the rescission of a contract in some cases of misrepresentation, this possibility is limited to cases of deceit or delusion about the nature of the transaction or about material characteristics of its subject matter. In this regard, **actual damages can only be recovered if there is deceit or deliberate delusion**.

In terms of **remedies and liability** it is usually advisable to establish penalties and adapt or terminate the contract in the event of breaches. Merely recovering damages may not work well due to the high standard of proof, especially with regard to lost profit. At the same time, when choosing the penalty amount you should remember about the **right of a court to decrease the agreed amount if the latter is clearly disproportionate to the consequences of the breach**.

Another tricky moment relates to the **liability for breach of warranties**. Indemnity is explicitly provided by law for Hi-Tech Park residents only, while all other persons have no better grounds for applying it other than freedom of contract. At the same time, **standard remedies established by civil law may not suit the legal nature of warranties well**. The options available are to link the warranty to some obligation or to allow for the adaption or termination of the contract in the case of a breach.

Solutions

Though local law may seem restrictive in many ways regarding the organisation of the transaction process and the content of transaction documents, its actual impact on the transaction is less significant than it may appear: **with a bit of creativity it is almost always possible to find a solution** that is feasible under the local regulations and consistent with the needs of the parties. At the same time, the plain and simple approach inherent in Belarusian law may suit minor or medium-sized M&As in Belarus well, allowing for some "standard" procedures and concepts to be neglected in exchange for shorter and less expensive transaction processes.

If you are considering an acquisition in Belarus or you would like to get more information about the Belarusian M&A market, please contact the experts of Sorainen, the Baltic partner of WTS Global.

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