

Construction Law 2021

Russia Law and Practice

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1. General

1.1 Governing Law

The key provisions that govern and regulate contracts for carrying out construction and design works are set out in the Civil Code of the Russian Federation, particularly in Chapter 37 of Part 2 of the Civil Code, which is dedicated to a work contract, and in general provisions of Part 1 of the Civil Code regulating obligations of the parties and in general provisions on contracts.

The implementation of a construction project is also subject to public mandatory norms dealing with town planning, safety, supervision, permits, environmental aspects, etc. The key pieces of applicable legislation are:

- the Town Planning Code of the Russian Federation, which provides a legal administrative framework for the design and construction of capital construction facilities, the procedures for obtaining construction and commissioning permits, and the rules of construction control and supervision; and
- the Land Code, which establishes the statutory requirements for land use.

Construction is also subject to regional and local regulation, as well as various technical, environmental, architectural, health, geological, fire safety and other regulations.

1.2 Standard Contracts

With the exception of an investment agreement, there is no Russian standard form of contract applicable to a private construction project. Certain prescribed forms of concession agreement do exist in relation to certain categories of facilities and special investment contracts (SPIC) and investment protection and promotion agreements (IPPA) as adopted by the Russian government, and other investment agreements which attach to the relevant legislation.

Construction work commissioned via public tender will use contract forms prescribed by the procuring entity and generally cannot be amended, barring for some very limited exceptions.

For major international private infrastructure projects, the EPC contracts will usually be implemented pursuant to the FIDIC suite of contracts (primarily the Silver or Yellow Books). These forms will usually be used to govern the employer contractor relationship where one of the parties is a foreign entity.

1.3 COVID 19

The construction market has been heavily affected by the COVID 19 pandemic, with many projects delayed, suspended or postponed. Project commissioning dates have been pushed back, with many contractors invoking force majeure. The Russian authorities have decreed the pandemic measures to fall within the classification of force majeure in a large number of cases. According to the Supreme Court of the Russian Federation, the pandemic related restrictions do not provide for a blanket force majeure in all circumstances, but rather must be established on a case by case basis, taking into account such particulars as the period required for the fulfilment of an obligation, the nature of an unfulfilled obligation, and the debtor's actions.

To support the construction market, several state measures have been introduced since April 2020, including:

- reduced interest rates (6.5%) for the entire period of personal mortgage loans, if applied for prior to November 1, 2020, in order to support residential construction;
- the availability of bank loans for construction companies;
- allowing public entities not to apply certain penalties to contractors under public procurement contracts for the implementation of capital construction projects if failure to perform was caused by the COVID 19 pandemic;
- extension of permits – if the expiration date of a construction permit falls between April 7, 2020 and January 1, 2021, then the validity period of the construction permit is extended for another year; a similar rule on the extension of the validity period is applicable to the urban development plan for a land plot (GPZU) and the territory planning project (which are used in the course of expert review of design documentation); and
- obtaining loans from self regulated organisations – until January 1, 2022, members of self regulated organisations can receive loans from the compensation fund.

2. Parties

2.1 The Employer

The employer is usually a project owner. Depending on the scale of the project, this can be a private company (medium or large) or a public entity.

The Civil Code of the Russian Federation lists the rights and obligations of the employer, which can be supplemented by an agreement between the parties.

Upon completion of construction, the employer is entitled to receive a constructed facility in full compliance with the requirements of the applicable law and the contract. The employer can demand from the contractor that the design/construction works be carried out in full compliance with the applicable law and the contract, including the employer's requirements to have the work performed for the agreed price and within the time agreed by the parties.

The following can be considered as the general obligations of the employer:

- to provide the construction site and the construction permit to the contractor;
- to ensure that the construction site is connected to the necessary utilities;
- to provide the technical specifications, including the design (if not part of the contractor's work) and other background information;
- to pay the contract price;
- to co operate with the contractor;
- to exercise employer's construction control over the contractor; and
- to inspect and take over the works on completion.

Unless the law or the contract require the contractor to perform work without engaging any third parties, the contractor is entitled to engage subcontractors. In this case, the contractor shall assume the role of a general contractor and be liable for the actions and omissions of its subcontractors as if they were its own. Unless the law or the contract provide otherwise, the employer and the subcontractor cannot make claims against each other arising out of the contracts entered into with the general contractor.

There are no specific provisions in the Russian law regulating the relationship between subcontractors and the financiers. It is not prohibited to include certain requirements for subcontractors in the contracts between the employers and financiers, including the step in rights of financiers. However, such step in rights cannot be automatically performed by the financiers upon the occurrence of trigger events: the employer needs to assign its rights and obligations to the financiers in writing.

2.2 The Contractor

All contractors (both domestic and foreign) operating in Russia are subject to a unified set of requirements.

The Town Planning Code requires construction work that affects safety to be performed by members of a self regulated organisation (SRO) that holds the relevant certificate of admission for the applicable work category. There are more than 250 categories of work requiring a certificate of admission.

With few exceptions, the general contractor, the designer and the technical employer should be members of an appropriate SRO, and in possession of a valid certificate of admission issued by the relevant SRO.

Since 1 July 2017, entities under construction contracts entered into with a developer, technical employer or responsible person for the operation of the building are no longer required to be SRO members if the total obligations under each such contract do not exceed RUB3 million. Certain other exceptions from the SRO membership requirement are found in the Town Planning Code, and generally relate to entities with at least 50% state participation that are engaged as contractors by the state.

Contractors have general obligations to:

- perform their work in accordance with the employer's requirements, design documents and other requirements of Russian law (including mandatory technical norms);
- perform their work without defect and rectify any defects in a timely manner, including during the defects notification period;
- hand over the works to the employer within the agreed time;
- procure all equipment and materials, unless otherwise provided by the employer;
- exercise contractor's control over construction (including supervision over subcontractors); and
- advise the employer in a timely manner of any issues that may affect the quality and timely performance of the works.

As mentioned in 2.1 The Employer, as a rule the contractor is entitled to engage subcontractors. In this case, the contractor shall assume the role of a general contractor and be liable for the actions and omissions of its subcontractors as if they were its own. Unless the law or the contract provide otherwise, the employer and the subcontractor cannot make claims against each other arising out of the contracts entered into with the general contractor.

2.3 The Subcontractors

Subcontractors are usually specialised organisations in particular areas of design, procurement and construction works. Within the framework of an EPC contract, the general contractor will often engage a Russian design institute to perform design and working documentation. Manufacturers of equipment are contracted to manufacture, supply and install the equipment. Local construction entities are usually engaged to perform civil construction works. Certain areas of construction might require specific knowledge and licences, such as nuclear power.

Unless the law or contract provide otherwise, the employer and the subcontractor cannot make claims against each other arising out of the contracts entered into with the general contractor.

The general contractor generally engages subcontractors to perform certain work streams without seeking the employer's prior consent. However, the parties may agree that the employer's prior consent for engaging subcontractors is required at all times or only in relation to certain subcontractors. In both cases, the general contractor will remain liable to the employer for work performed by its subcontractors.

The employer does not usually interfere in the relationship between the general contractor and its subcontractors, but the general contractor and the employer can agree that the employer will engage and pay the contractors directly. In this scenario, the general contractor will not be liable for works performed by direct contractors, with such contractors being directly liable towards the employer.

2.4 The Financiers

Project finance is widely used in Russia, especially in the oil and gas, energy and infrastructure sectors, with frequent participation by international banks until recently.

As a consequence of the sanctions regime introduced by the US and EU from 2014 and the subsequent limitations on access to long term debt financing from Western financial institutions for some Russian companies, most financing is currently provided by domestic banks or professional investors. The Russian Agency for Export Credit and Investment Insurance (EXIAR) and some European export credit agencies provide guarantees and insurance to construction projects. Meanwhile, the Russian Direct

Investment Fund (RDIF) has emerged as a key source of funding for international projects in Russia. In other instances, parent companies or shareholders provide project funding. Public investors (usually the government or municipal authorities) may provide financing in some cases, notably via PPP (public private partnership) schemes.

Financiers are not parties to a construction contract, and thus do not have any rights and obligations arising out of such contracts, unless they are acting as guarantors under a suretyship, in which case they might be held liable for performance of the obligations of the principal obligor under the construction contract.

At the same time, it is quite common for financing parties to demand various contractual protection mechanisms of which they will be beneficiaries in case a construction project fails to be implemented.

Contractual protection mechanisms in project finance transactions include the following:

- undertakings (including negative pledge undertakings and financial covenants);
- foreign law security agreements;
- suretyships (to secure contractual or non contractual obligations);
- guarantees governed by foreign or Russian law;
- sponsors' support agreements; and
- subordination and intercreditor agreements.

The requirement for certain proceeds to be paid into secured accounts may be used to support contractual undertakings. This security regime enables greater control by the lender over account withdrawals.

Guarantees governed by foreign law are commonly used for cross border project financing, whereas domestic project financing will typically make use of a Russian law independent guarantee or bank guarantee consisting of an on demand guarantee capped at a certain limit. Alternatively, a Russian suretyship agreement may be used, in which surety is the obligation of the third party creditor (the debtor), who is liable for non performance of the obligation by the debtor in full or in part.

3. Works

3.1 Scope

The scope of works is an essential element of the construction contract and is usually determined in the specifications or the employer's requirements, which are appended to the contract. It is also possible to entrust the contractor to develop the specifications based on a description of the scope in the contract. In both cases, this needs to be expressly stated in the contract. Contracts will often contain a large number of technical schedules, and may also include particular references to additional standards of work (i.e., in addition to those expressly specified in various mandatory technical regulations and requirements).

Time is of the essence. The contract needs to provide for the commencement and completion dates of work. Indication of any interim dates such as milestones is optional. Unless otherwise provided by law or contract, the contractor is responsible for compliance with the commencement date, interim dates and completion date. It is typical for a contract to include a basic time line/schedule of works, subsequently elaborated on by the contractor to provide for a more detailed programme of works.

3.2 Variations

Construction works should be carried out in accordance with the design and technical documentation defining the scope, content and other contract and statutory requirements. The employer has the right to amend the design and technical documentation on the condition that the cost of any additional work caused by such amendment does not:

- exceed 10% of the total costs specified in the calculation of costs; or
- change the nature of the works under the contract.

Any other revisions are subject to an agreement between the parties. The Civil Code expressly provides that the contractor is entitled to request adjustment of the price if the cost of works exceeded the price calculation by at least 10%, for reasons that are not attributable to the contractor.

The law does not specify exactly how the price should be adjusted, but following the underlying principle of good faith, the parties shall negotiate the revision of the price in good faith, taking into account the actual prices on the market, the cost of labour, inflation and other factors that affect the increase.

The parties to the contract will usually agree on a list of variations, on what constitutes additional work and how this additional work is to be formalised between the parties.

3.3 Design

There are different possibilities for the allocation of responsibilities for the design between the parties involved.

The employer is generally responsible for providing the initial data that will constitute relied upon information for the contractor.

Under an EPC contract, the general contractor will be liable for developing design documentation, working documentation and other technical documentation (regardless of whether it will be developed by itself or by a third party), unless certain categories of documentation are specifically excluded from its scope of work. The general contractor will be required to obtain the positive opinion of the state expert review in relation to the design documentation. As part of the design works, the contractor may be specifically required to conduct engineering survey works, data from which will be incorporated into the design documentation.

It is also possible for the employer to engage separate contractors for the various packages of work or combinations thereof. If the employer engages a separate design contractor from the contractor performing procurement and construction works, two options are possible:

- the contractor may agree to accept liability for design at an increased cost; or
- the contractor will rely upon such third party design as provided by the employer, in which case the procurement and construction contractor will be able to raise with the employer such issues and claims as arise out of the supplied design documentation.

The contractor is required to promptly notify the employer and to suspend work pending the employer's instructions if it discovers any of the following:

- that the materials, equipment and/or technical documentation provided by the owner are unfit or of poor quality;
- possible adverse consequences for the employer of the fulfilment of the employer's instructions; or
- other circumstances beyond the contractor's control which endanger the suitability or durability of the works or make it impossible to complete the works on time.

A contractor that fails to notify any of the foregoing or that continues work without receiving the employer's instructions shall forfeit the right to rely on such circumstances.

It is important to note that, under Russian law, the designer is liable for any defects in the technical documentation and engineering survey works, including defects discovered in the course of construction and operation of the constructed facility. If any such defects are discovered, the designer shall – at the employer’s request – remedy the errors in the technical documentation or engineering survey works at no further cost to the employer and reimburse to the employer any losses caused, unless the law or contract provides otherwise.

It is also worth noting that, in some projects involving international contractors or international employers, the design documentation, as understood by Russian law, may be preceded by basic design, pre FEED or FEED. In this case, it is important for the employer that the entity responsible for the design documentation assumes liability for such basic design, pre FEED or FEED.

3.4 Construction

The general contractor is responsible for completing the work within the time for completion and in accordance with the requirements of the contract and applicable law. The contractor usually bears the design and construction risks, as it is viewed as being best placed to take these risks as a professional. The contractor is responsible for the object under construction before it is handed over to the employer and therefore it bears the risk of loss of, or damage to, the object under construction, as well as the materials used.

As mentioned in 3.3 Design, it is quite standard to entrust different contractors to perform design, procurement and construction works, especially where the project involves complex processing equipment – in which case construction works become secondary to the manufacture, procurement and installation of the equipment. Construction works in such case will be limited to pure civil construction works and not require particularly sophisticated expertise. In this scenario, from the employer’s perspective it will be of key importance to allocate responsibilities between the contractors in the most efficient way.

The employer is usually responsible for providing various permits and authorisations see clause 3.6 (Permits), although it is also customary for the obligation to obtain those to be transferred to the contractor as part of its scope of works. The contractor may seek to limit or avoid taking on responsibility for obtaining the required permits or authorisations and shift these on to the employer. Contingencies relating to obtaining permits and authorisations will usually be accounted for in the agreed contract price and completion times.

The employer is also responsible for reviewing contractor documentation and providing approvals, although these do not relieve the contractor of responsibility for providing quality documents. Nevertheless, any delays in providing such approvals on the employer’s side may be used by the contractor as justification for extending the time for completion.

In a scenario involving multiple contractors, the employer will co ordinate all the works packages and manage the interface between the contractors. This contractual arrangement will be suited to projects where the employer is best positioned to bear the relevant project specific risks and risks associated with the interface between contractors.

3.5 Site Access

The employer is usually the party responsible for providing the construction site and all data relevant to the construction site. The site area and site conditions shall comply with the contractual requirements, and in the absence of such requirements the site area shall be such as to ensure the timely commencement of works, their regular performance and completion on time.

Altogether, the contractor is obliged to promptly notify the employer of any errors in the technical documentation, of any events that might adversely impact the performance of works and of the timely completion thereof. Should the contractor who was provided with the engineering survey results or other technical documentation discover an error in the documentation or otherwise become aware of events that might adversely affect the performance of works and their timely completion, it shall immediately notify the employer and suspend work pending receipt of further instructions. Failure to do so will result in the contractor being unable to rely on such circumstances in potential claims against the employer.

If the employer engages a separate contractor or a designer to carry out engineering survey works, such contractor will be responsible vis à vis the employer for the quality of the works performed and the technical documentation prepared as a result. Such technical documentation shall include a geotechnical report on the site conditions.

3.6 Permits

Before a construction project can start, the law requires the following documents to be obtained, depending on the project type:

- for linear facility developments, a development plan and a draft boundary survey. These territorial planning and zoning documents are adopted at the municipal level. In practice, they are often prepared by developers;
- for non linear facility developments, a town planning layout of the land plot. This is a territorial zoning document identifying the main characteristics of the site, including boundaries, types of permitted land use and construction parameters;
- an engineering survey report and a positive expert opinion on it (if the design documentation for the same facility will be subject to an expert opinion);
- a positive expert opinion on the design documentation (this is not required for some minor projects);
- technical conditions for connection to public utilities infrastructure (electricity, gas, water, sewerage, etc);
- a construction permit issued by local or federal authorities, depending on the project's scale and type;
- rights of way (if necessary); and
- specific consents of federal or local authorities, depending on the location and type of project (for example, special permits from sea ports or the Russian Federal Border Service).

By law, the employer is responsible for obtaining the above documents, since the owner holds title or leasehold to the construction site; however, such activity can be entrusted to the contractor or a third party acting as the technical employer (employer's representative) on the basis of an agreement and a power of attorney.

Upon the completion of construction, the following must be obtained for the project.

- A report on the compliance of the constructed facility with the requirements of the technical regulations and design documentation (commonly referred to in Russia as a ZOS). The ZOS is issued by a state construction supervisory authority following a final inspection. It is usually the responsibility of the general contractor to obtain a ZOS. No ZOS is necessary where state construction supervision is not carried out (usually for minor construction projects).
- A commissioning permit for the facility. This is the key document issued to the developer/ owner by the state authority or local government that has issued the construction permit, confirming completion of construction. The commissioning permit is issued on the basis of the ZOS and a number of other documents prescribed by law.

3.7 Maintenance

Unless otherwise provided by the law or contract, the contractor is fully responsible for the care of the works until the taking over, and bears the risk of loss of the works, or damage thereto. The party who has supplied the materials to be incorporated or used in the works bears the risk of its loss or damage, unless otherwise provided for by law or contract. However, it is customary to transfer risk of loss of, or damage to, the employer who provided materials and equipment to the contractor.

This means that the party responsible should make allocation for adequate storage and take all necessary measures to preserve the materials and/or works.

3.8 Other Functions

In standard private construction projects, other functions in the construction process (such as operation and finance) are not fulfilled by the contractor.

However, different types of arrangements can be found in the PPP agreements. Until recently, the only form of construction model allowed under the Federal Law on Concession Agreements was the BTO (build transfer operate) model. Other current construction models include build own operate transfer (BOOT) and design build transfer operate (DBTO). In the BTO arrangement, a private entity will be responsible for construction of a publicly financed facility, and upon completion transfers ownership to the developer while retaining responsibility for its operation. In the BOOT model, a state entity grants the right to finance, design, construct, own and operate a facility for a set time period. The DBTO model is similar to the BTO model but also grants the private entity rights to the design of the facility.

3.9 Tests

Russian law does not regulate the tests for completion.

The Civil Code entitles the owner to refuse the taking over and signing of the taking over certificate if the taking over is to be precedent on pre completion tests, and such tests turn out to be unsuccessful.

The parties usually contractually agree the procedure for running tests prior to completion and tests after completion, such as performance tests. The conducting of the tests and their successful completion are usually the responsibility of the contractor.

3.10 Completion, Takeover, Delivery

The contract will usually describe the completion, takeover and delivery procedures, and the actions each party must take at every stage.

When the contractor believes that the works have achieved completion in accordance with the contract, it shall send a notice to the employer attaching the required documentation. The parties will then jointly inspect the works and record the results of the inspections in a written report of the taking over commission. Once both parties are satisfied, the contractor applies for the certificate of completion (ZOS) to be issued by the construction supervision authority, with such certificate evidencing compliance of the constructed object with the design documentation and other mandatory requirements.

The construction supervision authority will check the compliance, can visit the site and, if satisfied, will issue the ZOS. Following its issue, the contractor or the employer (depending on the contract) will apply for the commissioning permit to be issued by the same authority that was responsible for the issue of the construction permit. Once the commissioning permit is issued, the parties will then sign a taking over certificate according to the contractual format and according to Russian accounting requirements. It should be noted that the taking over certificate can also be issued following receipt of the compliance certificate (ZOS) – this will be agreed in a contract.

If one of the parties refuses to sign the taking over certificate, the Russian Civil Code entitles the other party to sign a unilateral taking over certificate stating the refusal of the other party to sign it.

3.11 Defects and Defects Liability Period

The Civil Code of the Russian Federation provides special employer's remedies where the work was performed by the contractor with deviations, or with other deficiencies that make it unfit for the purpose envisaged in the contract or, in the absence of such purpose, for normal use in the contract – the employer has the right (unless otherwise provided by law or contract) to demand the following from the contractor at its discretion:

- to rectify the deficiencies free of charge within a reasonable time; or
- a proportionate reduction in the contract price; or
- reimbursement of its expenses for remedial work, if such right is expressly provided for in the contract.

If deviations from the contract or other defects are not remedied within the reasonable time set by the employer or are material and irreparable, then the employer has the right to terminate the contract and claim recovery of damages.

After the taking over, the contractor is liable for defects in the works for the defects liability period specified in the contract. If no defects liability period is agreed, then the claims in relation to the defects in the works can be filed by the employer within two years of the date of taking over, unless another timeframe is specified by law, contract or customs, and provided the defects were discovered within a reasonable timeframe.

The contractor must be notified of the defects within a reasonable timeframe. The parties to a contract can specify what they consider to be a reasonable timeframe for the notifications.

The Civil Code of the Russian Federation prescribes that the maximum time period within which the defects can be discovered is five years.

It is important to note that, under Russian law, the designer is liable for any defects in the technical documentation and engineering survey works, including defects discovered in the course of construction and operation of the constructed facility. If any such defects are discovered, the designer shall, at the employer's request, remedy the errors in the technical documentation or engineering survey works at no further cost to the employer and reimburse to the employer any losses caused, unless the law or contract provides otherwise.

The limitation period for filing a lawsuit in connection with the defects in buildings and constructions is three years from the date the employer became aware of the defect or should have become aware of such defect.

4. Price

4.1 Contract Price

The contract price can be lump sum or unit based, and can be fixed or based on an estimate. A fixed price is not subject to change (with a limited number of exceptions expressly provided for in the contract). The contract price usually includes all the contractor's costs and its remuneration for performance of the agreed scope of work.

The contractor is often required to provide a detailed breakdown of the contract price.

Parties are free to agree on any method of interim payments, including monthly payments, milestones, progress payments or advance payments.

4.2 Payment

Typically, the contractor's risk of late payment is mitigated by advance payments and the contractor's right to claim delay liquidated damages (neustojka) in the agreed amount.

According to the Civil Code of the Russian Federation, the contractor has the right of retention over the works and/or the employer's equipment in its possession until it has received the amounts due from the employer. This right of retention can be excluded by an agreement of the parties.

In practice, the contractor may also require an independent guarantee or bank guarantee from the employer securing its payment obligations under the construction contract or a pledge over the facility under construction. However, this type of security is not typical for construction projects.

Russian law does not expressly entitle the contractor to suspend work in case of non payment or delayed payment. However, the contractor can suspend work if the employer fails to perform its corresponding obligations under the contract.

4.3 Invoicing

Parties are free to agree on any method of interim payments, including monthly payments, milestones, progress payments or advance payments. The choice of the means of invoicing depends on the project requirements and structure. When progress payments are used, special accounting forms need to be filled in, which track the volume and progress of work performed (KS 2 and KS 3).

5. Time

5.1 Planning

There are no specific rules in the Russian construction or civil law related to planning. Thus, the contractual mechanism is required to effectively control the planning.

The contractor is usually required to develop a detailed plan and to regularly submit progress reports to the employer. The law requires work logs to be completed on a regular basis, and these are also inspected by the competent construction supervision authorities.

Planning can be safeguarded by different mechanisms, such as linking payments to the achievement of certain milestones, or introducing liquidated damages (*neustojka*) for failure to achieve certain milestones by the key dates. On the accounting level, special forms need to be filled in, which track the volume and progress of work performed (KS 2 and KS 3). These can be used as an alternative to milestone certificates.

5.2 Delays

The contract usually provides for the obligation of the parties to revise the programme and take the necessary mitigation actions to achieve the completion on time. For the contractor, this might mean that it needs to accelerate work, mobilise more personnel, engage more subcontractors, work in shifts, etc.

5.3 Remedies in the Event of Delays

As mentioned in 3.1 Scope, unless otherwise provided by the law or contract, the contractor is responsible for compliance with initial and interim dates and the time for completion. The Civil Code entitles the employer to terminate the contract and claim damages if the contractor does not commence the work on time or performs its work with such delays that it becomes apparent that it will not be completed on time. If the so contract provides, the employer is entitled to claim agreed delayed liquidated damages (*neustojka*) until the date of the taking over. The contract can also provide for the employer's right to make demands under a performance bond in case of delays, or use the retention amount.

5.4 Extension of Time

The contractor is entitled to an extension of time if the delays were caused by force majeure or events attributable to the employer. If any of these events are present, the contractor will usually notify the employer thereof, describing the event and attaching the particulars. The parties will then enter into a lengthy exchange of correspondence and negotiations. It is very rare that a project planner is involved (usually with foreign parties) to support the extension of a time claim.

5.5 Force Majeure

The doctrine of force majeure is recognised in Russian law and releases a party from liability if the failure to perform obligations was caused by a force majeure event (ie, an extraordinary event that could not have been foreseen and prevented). Although there is no exhaustive list of circumstances constituting force majeure, these are generally accepted to include natural disaster, war and military action, riots and embargoes.

The law also excludes specific circumstances from force majeure, particularly a breach of obligations by a counterparty (such as a subcontractor or vendor), and a shortage of goods or funds.

Foreign sanctions targeting the Russian Federation may or may not constitute a force majeure event according to the Russian courts. The position of the Supreme Court is that the COVID 19 pandemic and associated restrictive measures do not automatically constitute a force majeure event. Courts are required to consider and evaluate the particular circumstances of each case, including the type of activity of the debtor/obligor, the conditions for performance of such activity and the applicable local circumstances.

Release from liability requires the party to demonstrate how its inability to perform an obligation results directly from the force majeure event in question. It must demonstrate that the impact of the force majeure event could not have been foreseen at the time of contracting and cannot be overcome by alternate means.

5.6 Unforeseen Circumstances

The Russian civil law does not operate such a concept as “unforeseen circumstances” similar to the FIDIC Unforeseeable Physical Conditions or unforeseen ground conditions.

The employer is usually the party responsible for providing the construction site and all the data relevant to the construction site.

The contractor is obliged to promptly notify the employer of any errors in the technical documentation or materials provided by the employer and of any events that might adversely impact the performance of works and their timely completion, and to suspend work pending receipt of further instructions. Failure to do so will result in the contractor being unable to rely on such circumstances in potential claims against the employer.

Subject to the contractor’s obligation to notify, unforeseeable ground conditions generally fall within the employer’s responsibility. However, it is possible to transfer such risk to the contractor through individually negotiated agreements with the contractor.

Unforeseen circumstances of an extraordinary nature that could not have been prevented can constitute force majeure see clause 5.5 (Force Majeure) and thus release the party from liability for failure to perform caused by such unforeseen circumstances of an extraordinary nature.

6. Liability

6.1 Exclusion of Liability

Under the general rule, the limitation of liability is prohibited and an agreement on the limitation of liability is null and void if it contradicts the essence of the legislative regulation of the relevant type of obligation. Liability for wilful misconduct cannot be excluded.

6.2 Wilful Misconduct and Gross Negligence

The concepts of wilful misconduct, negligence and gross negligence are known to Russian civil law but not defined in the Civil Code.

The key principle of liability under Russian civil law is that the person in breach of its obligations shall be liable in case of fault (intent or negligence), except for instances where a law or contract provides for other grounds for liability. A person is considered to be not at fault if he/ she took all measures to properly perform the obligation with the degree of care and caution that was required of him/her by the nature of the obligation and the conditions of the transaction.

However, in B2B relationships, no fault is required to be established in order for the person to be found liable for breach of contract. Construction contracts between two legal entities are considered B2B transactions so no fault is required to be proven – the court will look to determine who is in breach of its contractual obligations or obligations stipulated in the Civil Code.

According to the clarification of the Supreme Court of the Russian Federation, the absence of malicious intent shall be proven by the person in breach of the obligation. For example, to prove the absence of malicious intent, the debtor who is released from liability or whose liability has been limited by the agreement of the parties shall provide evidence that he has shown at least a minimum degree of care and caution in his performance of the obligation. Consequently, the court will not apply the limitation of liability established for wilful misconduct.

6.3 Limitation of Liability

The exclusion of liability for non performance is generally only triggered by a force majeure event.

The parties to a contract may limit their contractual liability by:

- limiting damage compensation to actual losses only, excluding lost profits or other consequential damages;
- limiting compensation to specific categories of actual loss; or
- capping liability at a certain specified limit.

7. Risk, Insurance and Securities

7.1 Indemnities

Following changes to the Civil Code of the Russian Federation introduced in June 2015, the parties can agree on an indemnity amount in the event of economic loss arising from contractually defined circumstances not related to a contract breach by a party. This is a new legislative provision and to date there is little court practice related to its application and enforcement. Court practice to date suggests that the indemnifiable losses need to have already been incurred or otherwise be inevitable, and the indemnified party must prove a causal link between the trigger event and the loss; the compensation amount (or formula for calculation) must be expressly provided for in an agreement; and the obligation to compensate must not arise out of circumstances related to a breach of contract.

Generally, the parties would use compensation of economic losses in the following cases:

- death or personal injury;
- loss of, or damage to, another party's property;
- IP infringement; or
- any fees or penalties arising from public relationships, such as taxes, fines or other mandatory payments.

7.2 Guarantees

Russian law allows different forms of securities, including bank guarantee, independent guarantee (usually a parent company guarantee) and suretyship.

Suretyship is rarely used in construction contracts as it usually implies the joint and several liability of the guarantor, and suretyship is not independent from the underlying obligation.

The most common types of securities used in construction contracts are performance bonds (ie, an on demand bank guarantee or an independent guarantee securing the performance of the contractor's obligations under the contract) and advance payment bonds (ie, an on demand bank guarantee or an independent guarantee securing the return of the advance payment under the contract).

Both performance bonds and advance payment bonds are usually capped at a certain percentage of the contract price, though it is also possible to issue performance bonds for the whole amount of the contract price. They usually represent independent on demand irrevocable obligations of the issuer to pay the specified amount at the written request of the beneficiary. The Civil Code of the Russian Federation sets out key requirements to the bank guarantee, independent guarantee and suretyship, if issued under Russian law.

7.3 Insurance

Membership of an SRO is generally required for contactors operating in Russia, and SROs set out the requirements for civil liability insurance. Specific requirements may vary across SROs, but insurance must normally be maintained by contractors as a condition of membership and to limit the SRO's risk, given that SROs are subject to secondary liability for damage caused by their members.

Pursuant to Russian civil law, the parties may agree on who will take out insurance for the facility under construction and also agree on other types of insurance, such as:

- contractors' all risks (CAR) insurance;
- professional liability insurance;
- third party liability insurance (for injury caused during construction); and
- automotive civil liability insurance.

Where applicable, employers may be required to take out insurance coverage for hazardous facilities.

In practice, the general contractor is responsible for the construction site, and employers do not generally take out special insurance coverage.

7.4 Insolvency

Grounds for termination such as the insolvency or bankruptcy of either party are typically included in a construction contract. These may, however, be limited by the applicable Russian insolvency norms, depending on the stage of insolvency/bankruptcy proceedings.

Generally, all debts are deemed to be due and payable once proceedings have commenced, and no debt can be recovered by the creditors outside of the insolvency proceedings. All debt recovery is therefore suspended (except for that relating to employment, health or moral damage claims or property vindication claims).

In certain circumstances, construction contracts may provide step in rights for financiers in cases of employer insolvency. In practice, this will require the assignment of the employer's rights and obligations under the contract, but within the limits set forth by Russian insolvency law.

The applicable insolvency legislation allows for the setting aside of transactions entered into by the debtor in the lead up period prior to insolvency/bankruptcy, as specified in the insolvency legislation, if these are of a suspect nature (fraudulent or at an undervalue) or create a preference in relation to a creditor's claims, if these are concluded or performed by the bankrupt entity.

7.5 Risk Sharing

The Civil Code of the Russian Federation prescribes which party, as a rule, will be responsible for which risks. In certain cases, parties to a contract are allowed to change the statutory allocation of risks.

Design and construction risks are typically borne by the general contractor, which is viewed as being best placed to take on such risks on a professional basis. However, the construction contractor can be released from the design risks if the design documentation development was awarded to a design institute and the construction contractor has not assumed the design risk.

Responsibility for the object under construction is borne by the contractor prior to its handover to the employer. The contractor therefore bears the risk of loss of, or damage to, the object under construction.

Other risks which are usually assumed by the contractor are as follows.

- Risk of unforeseen cost escalation during construction in a fixed price contract (mitigated by careful negotiation of the contract conditions entitling the contractor to claim an increase of price, by efficient procurement procedures and by subcontract management, with the latter containing back to back or otherwise stricter provisions than provided for in the primary contract with the employer).
- Failure to complete construction within the timeframe for completion. Unless otherwise provided for, the contractor is held responsible under Russian law to meet commencement, interim (milestone) and completion dates, and is obliged to compensate the employer for losses caused by any delay therein (mitigated by a detailed description of variation procedures, clear definitions of the reciprocal obligations of the parties, efficient subcontract management and liquidated damages for delay (neustojka)).
- Payment delays (this risk is managed by creating a balanced payment mechanism with features such as advance payment, agreement on liquidated damages (neustojka) or interest for payment delays, or a bank guarantee or lien over the constructed facility).
- Choice of materials (managed by quality control procedures and the selection of reputable suppliers/manufacturers).
- Delays by subcontractors (mitigated by the selection of reputable suppliers/manufacturers).
- Quality risks, including failure to achieve performance guarantees (usually mitigated by the limitation of a liability cap).
- Change in law (in the absence of any specific provisions).

The employer usually bears the risks for the following:

- unforeseen site conditions (which can be mitigated through the transfer of this risk onto the contractor);
- delays in obtaining permits (as this is usually the employer's risk, the contractor may claim an extension of time);
- employer materials and equipment;
- in a scenario involving multiple contractors, the employer bears the risk of a gap in liability between the contractors; and
- price escalation in an estimate based or reimbursable contract (which can be managed by efficient planning and early procurement, threshold price escalation provisions, and value engineering).

8. Contract Administration and Claims

8.1 Personnel

A construction contract would generally contain provisions on the proper qualification of the personnel involved, on the approval and non replacement of key personnel and on the requirements for the personnel to have all the necessary permits (including visas) to comply with local laws, including HSE and labour requirements.

8.2 Subcontracting

There are generally no limitations on subcontracting, although some public contracts may contain such limitations.

As a rule, contractual provisions on subcontracting will include the right to subcontract, the employer's approval of some or all subcontractors or no approval, and the procedure for sub contractor selection.

8.3 Intellectual Property

Generally, a contract would contain provisions on the background IP and the IP created in the course of performance of the contract. As for the latter, the contract would typically provide for the employer's proprietary rights to the design and other technical documentation. The contract may also require the contractor to obtain proprietary rights to the IP created by its personnel.

If the project involves complex processing equipment or other know how, the contract would include provisions on compensation of economic losses (indemnities) arising out of IP infringement.

9. Remedies and Damages

9.1 Remedies

The employer is usually entitled to the following remedies in the event of the contractor's breach:

- recovery of losses;
- termination of contract (for convenience or cause);
- liquidated damages for delay (neustojka) or failure to achieve performance guarantees (if agreed contractually);
- various penalties (if agreed contractually); and
- retention amounts.

The employer also has the right to require the contractor to rectify defects in the works or to perform the remedial works with its own efforts (if expressly agreed), and to claim losses from the contractor or to claim a reduction of the contract price.

The contractor's remedies are usually more limited and include an early termination right if the employer has breached its obligations.

The contractor is usually entitled to the following remedies in the event of the employer's breach:

- termination of contract;
- delay liquidated damages (neustojka) (if agreed contractually);
- interest on late payment;
- retention of the works in case of non payment (if not excluded contractually); and
- recovery of losses.

As a general rule, an affected party may recover losses regardless of whether there are other remedies available to it or whether the party's right to recover losses is specifically mentioned in law or in an applicable agreement.

9.2 Restricting Remedies

The parties to a construction contract cannot generally exclude or limit the remedies available to them under the Civil Code, unless the Civil Code expressly allows to do so. For example, it is possible to exclude the contractor's right of retention (lien) of the works or such employer's remedy as the right to perform remedial works. It is also possible to stipulate in a contract that where liquidated damages (neustojka) or penalties are provided, no losses will be recoverable on top or in addition.

9.3 Sole Remedy Clauses

Russian law construction contracts do not usually contain a sole remedy clause, except for delays. For delays, it is not unusual to provide that delay liquidated damages (neustojka) will be the sole remedy.

The Russian Civil Code provides different remedies that are available at different stages of the project life see clause 9.1 (Remedies).

9.4 Excluded Damages

It is typical to exclude loss of profit from recoverable damages in Russian law governed construction contracts. Foreign law governed construction projects implemented in Russia can have a more extensive exclusion of different forms of consequential damages.

9.5 Retention and Suspension Rights

The contractor is entitled to retain the construction works as well as the employer's equipment and materials that were transferred to the contractor for construction until he has received all the amounts due, unless the contractor's right of retention is expressly excluded in the contract.

The Civil Code requires the contractor to suspend works upon the discovery of poor quality technical documentation or materials provided by the employer, or in the event of adverse consequences for the employer of the fulfilment of the employer's instructions or other events that endanger the durability or suitability of works or make it impossible to complete the work on time.

The contractor is also required to suspend work if it discovers that some necessary work is missing from the technical documentation, and this leads to an increase in the price calculation if the employer fails to respond to the contractor's notice within the prescribed period of time.

The contractor is entitled to suspend works when the employer's breach prevents the performance of its obligations (for example, failure to provide the employer's material and equipment or technical documentation).

These suspension rights/obligations of the contractor cannot be excluded in a contract. The parties can agree on any other grounds for suspension.

10. Dispute Resolution

10.1 Regular Dispute Resolution

The majority of disputes are settled in state arbitrazh (commercial) courts, which have the competence to hear commercial disputes. Construction disputes involving individuals are otherwise settled in common jurisdiction courts.

10.2 Alternative Dispute Resolution

Where a dispute can be arbitrated and the contract includes an arbitration clause, it will be referred to an appropriate arbitration tribunal. The arbitration award will be binding and can generally only be challenged on procedural grounds in a state court.

Construction contracts involving a foreign employer or contractor will normally contain an arbitration clause.

Currently, disputes that arise out of public tenders for state or municipal needs and the subsequent performance of state contracts are not arbitrable.

After arbitration, the most common ADR method in construction projects is the Dispute Adjudication Board, as contained in each of the FIDIC

Red, Yellow, Silver and Gold Books. Mediation is also a popular form of ADR and, according to the Arbitration Procedural Code, mediators can be engaged for dispute resolution even if proceedings have already begun before the state arbitrazh (commercial) court.

Trends and Developments: Russia

Key Factors Shaping the Construction Market

The Russian construction sector is undergoing regulatory changes and has been facing a number of challenges, including a reduction in investments, EU and US sanctions, COVID 19 and issues associated with the pandemic.

Some companies operating in the construction sector have found themselves affected by the EU and US sanctions, being unable to attract long term debt financing from Western financial institutions and/or to procure materials/equipment from Western companies. There remains the ongoing risk that a further tightening/expansion of sanctions imposed by the EU or the US will dampen growth in the market or result in the cancellation or delay of certain projects, particularly those involving large Russian construction companies that may be the target of sanctions that either further restrict their access to financing or reduce their ability to contract with foreign investors.

As a result of the COVID 19 pandemic and the related restrictions, including a lockdown in the spring months, movement restrictions, and the diversion of public funds into the healthcare and emergency sectors, many projects were delayed, suspended or postponed due to disruptions to supply chains on a worldwide level and bans on travel effectively preventing the use of foreign labour. Project commissioning dates have been pushed back, with many contractors invoking force majeure. However, the Russian courts took the view that the pandemic related restrictions do not provide for a blanket force majeure in all circumstances, which rather must be established on a case by case basis.

Notwithstanding some reductions in investments in the commercial non residential construction sector, the sector showed moderate growth in 2020, especially in industrial and warehouse property. According to the forecast by the MarketLine Industry Profile (MarketLine Industry Profile, Non Residential Construction in Russia, September 2020) the growth in the Russian nonresidential construction sector is projected to reach USD127.2 billion by 2024.

As regards infrastructure, the energy and utilities sectors are expected to perform best, mostly as a result of investments into the oil and gas pipeline network. Russia's transport infrastructure is also expected to show some constant growth as a result of the implementation of national development programmes.

Altogether, ongoing uncertainties around the pandemic and the shift by many companies to remote working arrangements are likely to constrain growth expectations in the near future. Furthermore, publicly funded construction projects may often be affected by oil price fluctuations, and further reductions in oil and gas revenues may lead the Russian government to delay or cancel investments in certain construction projects.

As part of the measures taken to support the construction sector following the COVID 19 pandemic, the government confirmed that earlier planned design, construction and reconstruction of the infrastructure works will be continued. To facilitate the continuation of construction projects a number of measures were adopted, including the following:

- the possibility of drawing loans from the compensation fund by members of self regulated organisations until January 1, 2022;
- waivers of certain penalties by public procuring entities under public procurement contracts for the implementation of capital construction projects if failure to perform was caused by the COVID 19 pandemic;
- an increase of the maximum amount of advance payment to 50% under already executed contracts for construction of capital facilities; and
- the extension of the following various permits:
 - a. construction permits with an expiry date between April 7, 2020 and January 1, 2021 are extended for 12 months; a similar rule on the extension of the validity period is applicable to the urban development plan for a land plot (GPZU) and the territory planning project (which are used in the course of expert review of design documentation); and
 - b. subsoil licences with an expiry date between March 15, 2020 and December 31, 2020 are extended for 12 months.

Market Trends and Flagship Development Projects

Increased number of transport and infrastructure development projects

The Russian construction sector is entering a new stage of development following the announcement of several major infrastructure projects as part of the RUB6.3 trillion (USD85 billion) six year modernisation plan to revamp domestic highways, airports, railways, ports and other transport infrastructure by 2024 and improve the connectivity of Russian regions, as well as create new routes on the Europe Western China transport corridor.

The most notable scheduled projects include the following.

- The Europe Western China transport corridor:
 - a. the construction of new motor roads on the Europe Western China transport corridor (Moscow Nizhny Novgorod Kazan) will reduce the time to reach Kazan from Moscow from 12 to 6.5 hours; and
 - b. the construction of the Meridian toll highway will connect the existing highway between Moscow and Minsk (Belarus).
 - The development and modernisation of railways, which envisages:
 - a. the modernisation of railway infrastructure for the Baikal Amur Mainline and Trans Siberian Railroad, to increase capacity to 180 million tonnes; and
 - b. the construction of the Moscow Nizhny Novgorod high speed railway.
 - Providing transport links between cities – by the end of 2024, 49 motor roads and railroads interchanges will be built or renovated, including railroad access to the ports of Azov and Black Sea Basin, Baikal and Amur and Trans Siberian mainline railroads, and to the Moscow and St Petersburg transport hubs.
 - The development of sea ports, with the target of increasing the combined capacity of Russia's sea ports to 1.3 trillion metric tons. Developments include:
 - c. development of the port infrastructure of the Arctic Basin;
 - d. development of the port infrastructure of the Far East Basin;
 - e. development of the "Vostochny Nakhodka" transport hub;
 - f. development of the port infrastructure of the North Western (Baltic Sea) Basin;
 - g. development of the port infrastructure of the Volga and Caspian (Caspian Sea) Basin;
 - h. development of the port infrastructure of the Azov and Black Sea Basin;
 - i. creation of a dry cargo area at the "Taman" sea port;
 - j. reconstruction of two berths of the Beringovsky port, which handles coal from the nearby Nagornaya Mine; and;
 - k. integrated development of the Murmansk transport hub, including construction of the "Lavia" coal terminal.
 - Reconstruction of airports – 68 airport complexes are expected to be reconstructed, including 38 airports in the Far East Federal District.
 - Northern Sea Route – in 2019, the Russian government adopted a programme to develop the Northern Sea Route, which includes a variety of developments, such as the construction of new infrastructure and ships, the mapping of natural resources, and the launching of new satellites and meteorological equipment. According to the corporate publication of the State Atomic Energy Corporation Rosatom, it will allocate RUB73 billion (USD984.19 million) for the development of the Northern Sea Route in 2021.
- Decisions are yet to be taken on a number of new major infrastructure projects within the framework of the Northern Sea Route, such as the Belkomur railway line between Arkhangelsk, Syktyvkar and Perm, a railway line from Sosnogorsk to Indiga on the Pechora sea coast, and a rail line connection across the River Ob from Salekhard to Labytnangi.
- Other notable projects include:
- the expansion of the Moscow metro and the development of areas around the metro expansion;
 - a 6 km bridge connecting Sakhalin Island in the Russian Far East with the mainland; and
 - construction of the Dzhubga Sochi highway.

State funding of large scale projects

Since most large scale projects are included in various national development programmes and road maps, a significant percentage of the funding of such projects comes directly from the government, which results in there being additional state supervision mechanisms over the projects.

Increased role of Russian banks in debt financing of development projects

As a result of the US and EU sanctions, the majority of private construction projects in Russia are currently financed by domestic banks or professional investors. This trend is likely to continue, given the sanctions regime imposed against Russia.

Reducing construction or operating costs, increasing energy efficiency, and increasing a building's life cycle

At present, the majority of apartment buildings in Russia do not comply with energy efficiency best practices. This is typical for both older and newer apartments. One of the goals set in the Energy Strategy of Russia for the period up to 2030 is developing a system of prospective regulations, standards and norms providing for increased responsibility for the inefficient use of energy by including requirements for energy efficiency (such as requirements for the energy consumption of equipment, for heat loss in buildings, and for water consumption) and the introduction of special energy saving standards and penalties for their violation.

Introduction of BIM modelling

In September 2020, Russia adopted the rules for the formation and maintenance of an information model for a capital construction facility (BIM model). The rules expressly specify which documents at each stage of the construction process should be maintained in an e form.

Repeal of a number of construction norms The government has revised the list of mandatory national construction standards and codes in accordance with the Technical Regulations on the Safety of Buildings and Structures, which resulted in the repealing of redundant or duplicate norms.

Digitisation of construction

The draft Strategy for Developing the Construction Industry in Russia by 2030 released by the Russian Ministry of Construction in 2019 announced significant changes in the construction sector, from promoting the use of innovative materials and simplifying the approval process for their use through digitisation, to the simplification and acceleration of the construction process, the reduction of construction or operation costs, increased energy efficiency, and the increase of a building's life cycle.

In September 2020, the Russian government adopted a number of documents aimed at digitising construction, including the Rules for Creating and Maintaining the BIM of the Construction Facility, the Rules for Creating and Maintaining the Classification of Construction Information, and the Rules for Maintaining the State Information System of the Town Planning Activity.

Besides the requirements for creating and maintaining a BIM, the Rules for Creating and Maintaining the BIM of the Construction Facility determine which documents should be kept in e form at various stages of construction and even operation, and set out the requirements for such documents. For example, they provide for the creation of the 3D model of the engineering surveys and the graphical section of the project design documentation – ie, the digitalisation of as built documentation.

Among other things, the Rules for Maintaining the State Information System of the Town Planning Activity (not yet in force) provide for the creation of a digital platform to store state expert opinions in relation to the design documentation.

Consolidation in the market

The Russian real estate and construction market is dominated by several large domestic companies, with foreign companies (mostly from Turkey and the EU) having a relatively small presence. Recent changes to financing rules that end shared equity construction and require contractors to obtain project financing for developments will accelerate the trend of greater consolidation in the market as the largest real estate developers (who have the financial standing to obtain project financing at favourable rates) acquire smaller firms in the market.

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