

GETTING THE DEAL THROUGH

# Construction

in 31 jurisdictions worldwide

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# Russia

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## 1 Joint ventures

Must foreign designers or contractors enter into a joint venture with a local contractor to design, build and be paid for their work? Does the law require that the local contractor control the joint venture?

There are no obligatory requirements for foreign designers or constructors to enter into a joint venture with a local contractor to design, build and be paid for their work, or for the local contractor to control the joint venture according to the Russian legislation. There is no difference in the legal status between Russian and foreign designers or contractors.

## 2 Foreign pursuit of the local market

If a foreign designer or contractor wanted to set up an operation to pursue the local market what are the key concerns they should consider before they took such a step?

Before setting up an operation to pursue the local market in Russia, a foreign contractor has to make a decision about the form of its operation. The following courses of action are possible:

- Establish a representative office or a branch of a foreign legal entity.
- Establish a Russian legal entity in the form of an enterprise with foreign investment, which is either entirely foreign-owned, or co-owned with a Russian partner. The Civil Code of the Russian Federation recognises, among others, the following types of commercial legal entities: general partnerships, limited partnerships, limited liability companies, additional liability companies and joint-stock companies (opened and closed).

The legal status of the foreign contractor in each case is different.

## 3 Licensing procedures

Must foreign designers and contractors be licensed locally to work and, if so, what are the consequences for working without a licence?

According to Federal Law No. 136-FZ amending articles 17 and 18 of the Federal Law on Licensing of Certain Types of Activities regarding construction licensing, dated 19 July 2007, licensing in the construction sphere, including design and engineering survey activities, was abolished on 1 July 2008.

## 4 Labour requirements

Are there any laws requiring a minimum amount of local labour to be employed on a particular construction project?

According to Russian labour legislation a minimum amount of local labour is not required to be employed on any particular construction project, but there are special labour requirements for foreign citizens in Russian Federation.

All employers must obtain the relevant documents (permission to hire foreign employees, work permit and work visa) before foreign citizens can be employed or actually commence working in Russia (except citizens of Belarus). The procedure and required documents vary according to whether the foreign national requires a Russian visa, and whether the employer is a Russian legal entity with foreign investments or representative offices or branch of foreign constructor. After a company permit is received, each employee should obtain a personal work permit in order to have the right to legally work in Russia.

Representative offices or branch of foreign companies should obtain personal accreditation for foreign employees and their family members.

Employers are required to provide financial, medical and social guarantees in respect of their foreign employees in Russia. Moreover, they should comply with the general migration-monitoring requirements and file notifications of foreign employees' travel in and out of Russia pursuant to the statutory procedure.

During the past year, the Russian government has made it a priority to improve control over the use of foreign employees in Russia. It has considerably enhanced regulation and enforcement of the above immigration law requirements.

Russian law provides severe penalties for non-compliance with work permit and work visa requirements for foreign employees.

## 5 Local labour law

Are there any labour laws applicable to construction and infrastructure projects?

The Russian Labour Code does not establish special rules for construction employees in respect of minimum wages, restrictions on number of hours worked, time for rest, guarantees and compensations, and material responsibility. There are additional regulations on the safety of construction employees.

## 6 Health and safety regulation

Are there any specific health and safety rules regulating the construction industry?

The Russian Labour Code, No. 197-FZ dated 30 December 2001 establishes labour safety requirements for construction as it is among the industrial activities specially regulated by Russian labour legislation.

Production facilities, construction and reconstruction projects, and other production equipment and processes, shall conform to labour protection requirements.

Construction, reconstruction, technical retooling of production facilities, manufacture and introduction of new equipment, or introduction of new techniques, shall not be allowed unless government findings

are available after examination of the labour conditions, stating that these things comply with labour protection requirements.

The use of harmful or dangerous substances, materials, products or goods and rendering of services, for which no measurable methods and means have been devised yet, and no toxicological evaluation (in terms of health protection or medical and biological assessment) has been carried out, shall be not allowed in production activities.

If harmful or dangerous substances are to be applied, which are new or have been not used in the organisation previously, the employer must agree ways of safeguarding its employees' lives and health with the relevant government supervisory bodies, and control over the compliance with the labour protection requirements, before it begins using the abovementioned substances.

Machinery, protective clothing and other production equipment, vehicles, processes, materials and chemical agents, and individual and shared means of employee protection, including those made abroad, shall comply with the health protection requirements established in the Russian Federation and show certificates of compliance.

## 7 Close of operations

If a foreign contractor, who has been legally working, decides to close its operations, what are the legal obstacles to closing up and leaving?

The procedure of operations closing depends on the form of the operation.

Federal Law No. 160-FZ on Foreign Investments, dated 7 July 1999, regulates that a commercial organisation with foreign investments shall be established and liquidated pursuant to the Russian Civil Code and other federal laws, with exceptions that may be established by federal laws. A branch of a foreign legal entity shall be liquidated on the basis of a resolution of the foreign legal entity.

A foreign legal entity shall notify the State Registration Chamber with the Ministry of Justice of Russia of the adopted resolution. Upon receiving notification, the State Registration Chamber with the Ministry of Justice of Russia shall draw up letters with an official notice regarding representative office termination of activities to be provided to the Russian tax, customs and migration authorities.

When a representative office is closed down, its approval for establishment and registration certificate, confirming registration in the state register of accredited representative offices of foreign companies in the Russian Federation, shall be returned to the State Registration Chamber with the Ministry of Justice of Russia, and seals and stamps given back for liquidation.

Accreditation cards and valid multiple-entry visas of accredited employees of representative offices and their family members are also subject to return to the State Registration Chamber with the Ministry of Justice of Russia.

Notification letters regarding termination of activities of a representative office are drawn up within 21 days starting from the day a full set of documents is provided. If required, this period can be reduced to seven working days.

## 8 Standard forms of construction contracts

What standard-contract forms are used for construction and design?

The main standard-contract forms used for construction and design according to part two of the Russian Civil Code (Federal Law No. 14-FZ, dated 26 January 1996) are as follows: building contracts, design and research contracts, and contract works for state needs (Chapter 37 of the Civil Code).

## 9 Price escalations

In typical construction contracts, who assumes the risk of material price escalation and shortages?

First and foremost it is needed to mention that under a contract agreement the price of a work (estimate) may be approximate or fixed.

In the first case it is possible to change the price after the conclusion of the agreement. Part two of the Russian Civil Code defines that if the necessity has arisen to perform additional works and, for that reason, to substantially exceed approximately estimated work price, the contractor shall be obliged to inform the customer thereof in good time. The customer who does not agree to the exceeding of the work price specified in the contract agreement has the right to refuse the agreement. In this event, the contractor may demand payment from the customer for the part of work already performed.

The contractor who has not warned the customer in a timely fashion about the necessity to exceed the work price stated in the agreement shall be obliged to execute the agreement, reserving the right to pay the original contractual price for the work.

If the price is fixed the contractor may not demand to increase the fixed price, nor may the customer decrease it, including when at the time of concluding the agreement it was not possible to foresee the entire volume of works to be performed or expenses to be incurred.

In the event of a considerable growth in the value of materials and equipment supplied by the contractor, as well as of services provided by third parties that could not be foreseen when the agreement was concluded, the contractor shall have the right to demand that the set price be increased and, should the customer refuse to meet this demand, the contract may be cancelled.

## 10 Competition

Do local laws provide any advantage to domestic contractors in competition with foreign contractors?

The Russian Federal Law on the Defence of Competition provides no advantage to domestic contractors in competition with foreign contractors in the Russian Federation.

## 11 PPP and PFI

In certain forms of construction such as PPP and PFI, where the contractor is responsible for long-term quality control and maintenance, how is the risk of additional future costs considered and mitigated?

Although Federal Law on Concession Agreements, No. 115-FZ regulates public-private partnerships in Russia, it is only applied to activities that are important to the whole of society such as construction of highways, railways, pipeline transport, sea and river ports, subway, airports, etc.

Russian civil legislation provides a special kind of contract agreement concerning contract works for state needs. Special rules for contractor responsibility, in this case for long-term quality control and maintenance, are not established, and usual and customary business practices or contract agreements are regulated by the special laws or governmental decree.

## 12 Payment of fees

How may a contractor secure payment of its fees from an owner? May the contractor place liens on the property?

The performance of obligations may be secured by penalty (fine, forfeit), pledge, suretyship, bank guarantee, deposit, and other means provided for by law or by a contract. Mandatory requirements for some of these are established by law while others are regulated by the parties themselves. Advanced payment is also advisable.

**13 Tort claims and indemnity**

Do local laws permit a general contractor to be indemnified against all acts, errors and omissions arising from the work of a subcontractor, even when the general contractor is negligent?

The general contractor shall be responsible to the customer for consequences of the failure to fulfil or for improper fulfilment of obligations by the subcontractor, and be responsible to the subcontractor for the customer's failure to fulfil or for improper fulfilment of obligations under the contract agreement. Moreover, unless otherwise provided for by law or contract, the customer and subcontractor shall not have the right to present each other with claims connected with a violation of contracts concluded by each of them with the general contractor.

**14 Insurance**

Do local laws require the maintenance of any specific type of insurance on construction projects?

A building contract agreement may impose the duty to insure respective risks on the party bearing the risk of accidental loss of or accidental damage to the construction project, material, and other property used in construction, or responsibility for causing harm to other persons during construction work.

The party on which the duty to insure is imposed must present evidence to the other party that it has concluded an insurance contract on the terms stipulated by the building contract agreement, including information about the insurer, the size of the sum insured and insured risks. The insurance shall not release the respective party from the duty to take necessary measures in order to prevent the occurrence of an accident that is covered by insurance.

**15 Insolvency and bankruptcy**

If a contractor files for insolvency, or is declared insolvent, may its contract be terminated for default and a new contractor retained to prevent delay on the project?

There are no restrictions on termination of the contract for default and retaining of a new contractor in order to prevent delay on a project if the contractor files for insolvency, or is declared insolvent according to the Russian legislation.

**16 Contracting with government entities**

Can a government agency assert sovereign immunity as a defence to a contractor's claim for payment?

A government agency is not able to assert sovereign immunity as a defence to a contractor's claim for payment as Russian civil legislation proceeds from recognising the equality of participants in relations regulated by civil legislation, inviolability of property, freedom of contract, inadmissibility of someone's intervention in private affairs, necessity for civil rights to be freely exercised, ensuring restoration of violated rights and their judicial protection.

The particulars concerning the responsibility of the Russian Federation and Russian subjects in matters regulated by civil legislation involving foreign legal persons, citizens and states shall be determined by the law on the immunity of the state and its property (article 127 of the Russian Civil Code).

**17 Bribery**

If a contractor has illegally obtained the award of a contract, for example by bribery, will the contract be enforceable?

If a contractor has illegally obtained the award of a contract, the contract can be voided by the court.

**18 Arbitration**

Can a government agency agree to arbitrate disputes privately rather than go to court?

Russian legislation does not contain any restrictions on government agencies agreeing to arbitrate disputes privately rather than going to court.

**19 Foreign corruption**

Do local laws prohibit illegal actions in foreign jurisdictions?

Not applicable.

**20 Force majeure and acts of God**

Under local law are contractors excused from performing contractual obligations owing to events beyond their control?

Unless otherwise provided for by law or by contract, the contractor who has not performed or who performed an obligation improperly while effecting entrepreneurial activity shall bear responsibility unless it proves that proper performance turned out to be impossible as a consequence of force majeure (unusual circumstances, unavoidable under the particular conditions). There are some circumstances that will not, however, be classed as such, particularly violation of duties on the part of the debtor's contractors, the absence in the market of goods necessary for performance, and the lack of necessary cash resources on the part of the debtor.

Under local law a contractor is excused from performing its contractual obligations owing to force majeure and acts of God if it has observed all the conditions provided by the agreement in the part regulating consequences of force majeure and acts of God.

**21 Dispute resolution mechanisms**

What dispute resolution procedures are successfully used to solve construction disputes?

As an alternative to the state arbitration courts, foreign investors may refer disputes to a private arbitration tribunal, including arbitration tribunals located either within or outside the Russian Federation. Arbitration proceedings may cover a wide range of issues, with the exception of disputes arising from administrative relations (for example, tax and customs) and disputes that fall within the exclusive jurisdiction of the Russian arbitration courts (for example, disputes arising from construction, or other disputes specifically enumerated in Russian law). The principal rules of international arbitration are governed by the Federal Law on International Commercial Arbitration, dated 7 July 1993; these rules are identical to the provisions of the Model UNCITRAL Law.

In addition, the international commercial arbitration provisions of various international treaties to which the Russian Federation is a party, in particular, the European Convention on International Commercial Arbitration of 1961 and the New York (United Nations) Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York Convention), also apply in Russia.

**22 Courts and tribunals**

Are there any specialised tribunals that are dedicated to resolving construction disputes?

There are no special tribunals under Russian legislation that are dedicated to resolving construction disputes. If the parties are only legal entities or individual entrepreneurs the construction disputes between them are resolved by the arbitration court, otherwise matters can be resolved by the trial court of the general jurisdiction.

### Update and trends

Legal regulation of construction in the Russian Federation is changing rapidly. According to Federal Law No. 136-FZ amending articles 17 and 18 of the Federal Law on Licensing of the Certain Types of Activities, on the question of construction licensing, dated 19 July 2007, licensing in the construction sphere, including design and engineering survey activities was abolished on 1 July 2008. The question about the cancellation of construction licensing arose regularly since the adoption of the licensing law. The first attempt to abolish it was made in 2005 when, by Federal Law No. 80-FZ, licensing in construction was supposed to cease on 1 January 2007. But neither state bodies nor Russian legislation was ready by this time and licensing was extended to 1 July 2007, and then to 1 July 2008.

The main purpose of the licence ceasing is to relieve the administrative burden on developers, building constructors and other professionals participating in or contemplating construction projects. It was proved that the licensing system in the construction sector, together with the system of state approvals and permits that has been operational in Russia for many years, cannot and does not guarantee superior quality construction. Moreover, the existence of a state-controlled system sometimes makes it very difficult – if not impossible – to determine who is actually liable for mistakes and defects, especially if all required licences were in place and the project and design documentation was approved by the supervising authorities. The problem is not how to strengthen the system of state control and supervision in the construction industry, but how to make all the professionals involved in a project effectively responsible for their work. It seems that this can only be achieved by further developing liability concepts in the construction industry, particularly by increasing the contractual liability of all construction projects.

Russian construction authorities are considering certain alternative regulatory measures to fill the gaps left since the licensing system has been abolished. There are two main instruments for regulating the construction sector. First of them is the establishment of self-regulating associations of construction professionals, which have to introduce certain standards and rules for their members and oversee their

implementation. The second is the implementation of the technical regulating in the construction relationship.

On 1 December 2007, Federal Law No. 315-FZ on Self-regulating Organisations was adopted, which establishes the legal basis for the operation of self-regulating organisations, their main functions, rights and duties. Self-regulating organisations are non-commercial organisations aimed at self-regulating and founded on a membership principle, joining the subjects of entrepreneurial activity due to conformity of the branch of goods (works, services) production or the market of produced goods (works, services) or uniting the subjects of professional activity of some kind that are referred to as self-regulating.

The Self-regulating Organisations Law is a very common law applied to many kinds of activity. As for construction, there are several draft laws concerning the amendments to the Town Planning Code. One of them is the Project of Federal Law No. 434371-4 on Amendment to the Certain Acts of Law in the Part of Replacement of Construction Licensing, which was adopted in the first reading on 14 March 2008 in the state Duma and contains special rules for self-regulating organisations in the construction sphere.

The second regulatory measure regarding licensing is the technical regulation system. Federal Law No. 184-FZ on Technical Regulating, dated 27 December 2002, defines technical regulation as the legal regulation of relations in the fields of establishing, application and executing of obligatory requirements for products, processes of production, operation, storage, transportation, marketing and utilisation, and also in the fields of establishing and application, on a voluntary basis, of the requirements for products, processes of production, operation, storage, transportation, marketing and utilisation, executing of works or rendering of services, and legal regulating of relations in the field of conformity assessment.

In conclusion, it is necessary to say that in spite of fact that Russian construction legislation is now changing, essentially the process of total replacement of the obsolete rules will take much time and only practice will show the defects of new system of the regulation in the construction sphere.

### 23 Dispute review boards

Are dispute review boards (DRBs) used?

Not applicable.

### 24 Mediation

How is mediation defined? And is it commonly used to resolve project disputes?

Although mediation and other forms of alternative dispute resolution are fairly widely discussed in the legal community, there is no established practice for invoking such procedures in the Russian Federation. Nor is any legislative regulation available for this kind of alternative dispute resolution (apart from commercial arbitration). There is no statutory provision, for example, that states that documents received by the parties in the course of mediation may not later be used as evidence in the courts, or that the alternative dispute resolution mediator may not subsequently be called as a witness in legal proceedings between the parties.

### 25 Confidentiality in mediation

Are statements made in mediation confidential?

Statements made in mediation are not confidential. The general norms of Russian civil legislation on confidential regulation are applicable.

### 26 Arbitral award

Is there any basis upon which an arbitral award issued by a foreign or international tribunal may be rejected by your local courts?

A foreign court judgment may be enforced in Russia only if such judgment has been recognised by a Russian court. Such recognition is available if supported by a relevant international treaty and federal law that applies. Despite a lack of direct regulation, Russian courts now recognise and enforce foreign court judgments on the basis of reciprocity.

The Russian Federation is a party to a number of bilateral agreements concerning the recognition and enforcement of court judgments. Arbitral awards rendered by arbitration tribunals located within or outside of the Russian Federation are also executed by the bailiff service after such awards are recognised and ordered to be enforced by the Russian courts. As a rule, Russian courts may not review any foreign arbitral award on its merits. The grounds for the refusal to recognise and enforce foreign arbitral awards are generally the same as those set forth in the New York Convention.

**27 Governing law and arbitration provider**

If a foreign contractor wanted to pursue work and insisted by contract upon international arbitration as the dispute resolution mechanism, which of the customary international arbitration providers is preferred and why?

It is up to the parties' agreement which of the customary international arbitration providers is preferred if a foreign contractor wanted to pursue work and insisted by contract upon international arbitration as the dispute resolution mechanism.

**28 International environmental law**

Is your jurisdiction party to the Stockholm Declaration of 1972? What are the local laws that provide for preservation of the environment and wildlife while advancing infrastructure and building projects?

Russia is a party to the Stockholm Declaration of the United Nations Conference on the Human Environment, dated 16 June 1972.

There are also the local environmental regulations in Russia concerning environmental protection. The main special regulatory Act is the Federal Law on Environmental Protection, which establishes general requirements on performing economic activities, including the operation and maintenance of real estate such as buildings and facilities, environmental impact assessments and environmental pollution liabilities.

It defines special environmental requirements in each step of the construction process such as drawing the project plans, preparing for the construction, the construction itself or obtaining user permits. The observation of the requirements of the environmental legislation is confirmed by the conclusion of the special state body in the sphere of the environmental protection.

**29 Other international legal considerations**

Are there any other important legal issues that may present obstacles to a foreign contractor attempting to do business?

There are any other important legal issues that may present obstacles to a foreign contractor attempting to do business in Russia.

**30 International treaties**

Is your jurisdiction a signatory to any investment agreements for the protection of investments of a foreign entity in construction and infrastructure projects? If so, how does your model agreement define 'investment'?

Although Russia participates in many investment agreements for the protection of investment, there are no specific agreement for the

protection of the investments of a foreign entity in construction and infrastructure projects.

**31 Tax treaties**

Has your jurisdiction entered into double taxation treaties pursuant to which a contractor is prevented from being taxed in various jurisdictions?

The Russian Federation has concluded the bilateral agreements for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital with many countries. Among them, for example, are:

- the agreement between the government of the Russian Federation and the government of the republic of Lithuania for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital (Moscow, 29 June 1999);
- the protocol to the convention between the government of the Russian Federation and the government of the Czech Republic for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital (Moscow, 27 April 2007);
- the convention between the government of the Russian Federation and the government of the kingdom of Saudi Arabia for the avoidance of double taxation and the prevention of tax evasion with respect to taxes on income and on capital (Riyadh, 11 February 2007).

Such agreements regulate taxation of profits from any commercial activity including contractor's profit.

**32 Currency controls**

Are there currency controls that make it difficult or impossible to change operating funds or profits from one currency to another?

Federal Law No. 173-FZ on Currency Regulation and Currency Control, dated 10 December 2003, and which entered into force on 18 June 2004, does not establish any limitations concerning changing the currency of operating funds or profits.

**33 Removal of profits and investment**

Are there any controls or laws that restrict removal of profits and investments from your jurisdiction?

There are no controls or laws that restrict removal of profits and investments from Russia.



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**34 Contractual matrix of international projects**

What is the typical contractual matrix for a major project in your jurisdiction in terms of the contractual relationships among the various construction project participants?

According to the Town Planning Code and Federal Law on Investment Activity carrying out in the Form of the Capital Investment, No. 39-FZ, dated 25 February 1999, the following are the partici-

pants in the construction process in Russian Federation: an investor (owner), a construction manager and a contractor.

The construction manager is not an obligatory participant; the owner itself can fulfil the construction manager's function. Before the ceasing of the construction licence, the owner used to have to possess a special licence for the fulfilment of the construction manager's function. Since 1 July 2008 this has not been a requirement.