



You're Doing Construction in Russia, Now What?

03.29.2022

In recent weeks, there has been a long list of companies, from all industries spanning from construction/engineering to fashion and hospitality, that have announced that they are completely severing ties with Russia, while a host of others have announced a temporary halt. See Jeffrey A. Sonnenfeld, *Over 400 Companies Have Withdrawn from Russia – But Some Remain*, Yale School of Management (Updated Mar. 21, 2022), https://som.yale.edu/story/2022/over-400-companies-have-withdrawn-russia-some-remain?utm_campaign=mb. For those developers, EPC contractors, and design professionals (engineers and architects) who have construction projects in Russia, the question is, “How should we proceed?”

The U.S. initially stated that it was not issuing a total embargo on business dealings and trade relations with Russia in response to the nation’s invasion of Ukraine. Instead, the U.S., along with many other Western nations, issued targeted sanctions. See Francesco Giumelli, *Understanding Targeted U.N. Sanctions: An Empirical Analysis*, *International Affairs*, 91(6), 1351-1368 (explaining the difference between embargoes and targeted sanctions). However, after evidence of war crimes by Russia emerged, President Biden issued an Executive Order prohibiting U.S. individuals, whether in the states or abroad, from new investments in Russia and prohibiting U.S. individuals from transactions with Russian state-owned entities. See April 6, 2022, *Presidential Actions*, <https://www>.

[whitehouse.gov/briefing-room/presidential-actions/2022/04/06/prohibiting-new-investment-in-and-certain-services-to-the-russian-federation-in-response-to-continued-russian-federation-aggression/](https://www.whitehouse.gov/briefing-room/presidential-actions/2022/04/06/prohibiting-new-investment-in-and-certain-services-to-the-russian-federation-in-response-to-continued-russian-federation-aggression/). This new Executive Order is said to not affect existing contracts in Russia, but instead prohibits new ones.

While U.S. companies and individuals can lawfully engage in certain, apparently now limited, business activities involving Russia that are not subject to sanction, these companies need to be wary as to the type of business they will continue doing as penalties for violating U.S. sanctions can be severe. See Russia – Country Commercial Guide, Official Website of the International Trade Administration, U.S. Department of Commerce, <https://www.trade.gov/country-commercial-guides/russia-sanctions>. Therefore, it is advised that construction and design-related firms familiarize themselves with potentially applicable sanctions and to perform a thorough due diligence to ascertain whether a particular type of business activity or customers, clients, suppliers, or partners may be subject to sanctions. *Id.* Information as to what U.S. sanctions have been issued can be found on the U.S. Department of Treasury's website: <https://home.treasury.gov/policy-issues/financial-sanctions/sanctions-programs-and-country-information/ukraine-russia-related-sanctions>, and by a review of the President's Executive Orders, <https://www.whitehouse.gov/briefing-room/presidential-actions/>. For those firms with a multi-national presence, it is advised that due diligence be performed as to those respective nations as these new sanctions are being coordinated with members of the G-7 and the European Union.

Additionally, certain states have moved to relieve themselves from construction-related Russian connections. For example, New Jersey is developing a list of prohibited businesses and people with ties to Russia and Belarus. Construction and design firms on this list will not be able to benefit from contracts with New Jersey state agencies including, but not limited to, public works contractor registration, subsidies from the New Jersey Economic Development Authority, state redevelopment contracts, and tax incentives for construction projects within the state. New York's Governor has issued an Executive Order ending all state business with Russia. Due diligence for state prohibitions should also be performed.

In determining whether to continue conducting business operations in and business dealings with Russia, considerations that should be taken into account include but are not limited to:

- The source of payments for any services provided in Russia (Russia's large financial services sector is heavily dominated by state-owned actors; accounting for secondary targets becomes central to the analysis when sanctions directed at intermediary actors come into play and, as noted above, **you do not want to become a secondary target of U.S. sanctions or be hit with a penalty for violating sanctions**), see U.S. Treasury Announces Unprecedented & Expansive

Sanctions Against Russia, Imposing Swift & Severe Economic Costs, U.S. Department of the Treasury, (Feb. 24, 2022) <https://home.treasury.gov/news/press-releases/jy0608>; see also Francesco Giumelli, *Understanding Targeted U.N. Sanctions: An Empirical Analysis*, 1351-1368 (explaining the risks to secondary targets);

- The ability to obtain supplies and materials needed (Maersk, the global shipping giant, has suspended Russian bookings; FedEx and UPS announced it will cease operations in Russia; it is reported that export-related sanctions will cut off more than half of Russia's high-tech imports, restricting Russia's access to vital technological inputs, thereby deteriorating its industrial base);
- The ability to get personnel into and out of Russia (all Russian flights have been banned from the US, UK, EU, and Canadian airspace);
- **As reported by The Wall Street Journal on March 14, 2022, Russia has now issued retaliatory threats against companies that make the decision to withdraw from the country, which threats include the seizing of assets and arrests of company executives**, see Jennifer Maloney, *Russian Prosecutors Warn Western Companies of Arrest, Asset Seizures*, The Wall Street Journal, March 14, 2022;
- The relevant contracts at issue and the rights and remedies contained within same, including any third party rights such as subcontractors and suppliers.

If your company has determined that continuing to do business in the country is not worth the reputational damage or operational hassle, the issue then becomes how to cease operations. This would be governed by the contract(s) entered into.

There are no Russian standard forms of contract for a private construction project, except investment agreements. Moreover, construction contracts for projects in Russia do not always have to be governed by Russian law – read your contract to determine what choice of law was provided for. See Anastasia Kastelskaya, *Construction, and Projects in the Russian Federation: Overview*, Practical Law w-034-6658 (June 1, 2021). If your choice of law is Russian law, it is arguable that the doctrine of force majeure will provide you with contractual relief. Under Russian law, a party is released from liability if failure to perform its contractual obligations as a result of a force majeure event – an extraordinary event that could not have been foreseen and prevented. There is no exhaustive or even approximate list of circumstances that would constitute force majeure events. In practice, Russian law has treated the following events as force majeure:

- Natural disasters;
- War and military actions;

- Riots;
- Embargoes.

Id. There is currently no governing law that provides that sanctions introduced against the Russian Federation may be considered by Russian courts as a *force majeure* event. Moreover, it is not clear if a war outside of the Russian territory would be considered an act of war *force majeure* event. *Id.*

If a *force majeure* event is of a temporary nature, an obligor can be released from liability for a reasonable period during which it is prevented from discharging its obligations due to the event. Therefore, the obligor will be required to complete its performance once the *force majeure* event has ceased. *Id.*

Russian law has not treated the following as *force majeure* events:

- Breach of obligations by a counterparty (for example, subcontractors, vendors);
- Lack of goods required for work on the market;
- Lack of funds.

Id.

Given the above, it may be that the best course of action would be to have an open dialogue with the contracting party on the other side. The intent of western sanctions was to make it impossible to do normal business in Russia and to create a major economic slowdown within the nation. As such, Russian contracting parties may find it more preferable to put a pause on any contractual performance that would require payments from them, payments that they may not be able to make. The possibility of setting up a mutually agreeable pause on relations may very well be a realistic option.

Keep in mind, if you are owed money for any Russian-related contracts, there is a likelihood that you may be unable to recover any such monies. “There is no doctrine of binding precedent in Russia.” *Id.* As such, court decisions are decided on a case-by-case basis. The Russian courts “can give diverse judgments.” See Valeriya Kachura, *Legal Systems in the Russian Federation: Overview, Practical Law* (May 1, 2021). Russian judges are hand-picked by Putin. *Id.* Additionally, in response to various sanctions levied against it, Russia is enacting a series of laws to protect its interest in favor of Russian entities. For example, Russia has recently passed a law providing that the Russian Courts have exclusive jurisdiction over certain disputes involving Russian sanctioned individuals and entities, and the Russian Supreme Court has enforced this law. See *Russian Courts to Have Exclusive Jurisdiction Over Sanctioned Persons*, *Global Arbitration Review*, June 15, 2020; see also Supreme

Court of Russia Case No. A60-36897/2020 (Dec. 9, 2021). Orders entered by arbitrators or foreign tribunals may be unenforceable in Russia, and the party seeking enforcement can be subject to fines by Russia. *Id.* Accordingly, it can be concluded that any attempts by Western companies seeking to recoup monies from Russian entities and individuals, as a result of the recent political climate, may be deemed to be unfair to these Russian entities and individuals by the Russian courts.

ATTORNEYS

Anazette W. Ray

Michael J. Vardaro

PRACTICE AREAS

Contract Negotiation & Preparation

International Projects

Litigation & Alternative Dispute Resolution