

Certain Legal Aspects of the 'Review' of Moscow Investment Contracts

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November 18, 2012

The  **Moscow Times**



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Since 2011 a review of investment contracts related to construction ("Contracts") has been under way in Moscow that has resulted in the termination and amendment of Contracts where investors have committed a material breach of their obligations, project timetables, etc.

As of March 2012, this review had resulted in the Moscow Town-planning and Land Commission banning the construction of around 10 million square meters of primarily commercial property. Moscow government officials have said that two years, or maybe less, will be required to complete the review of all Contracts.

Contracts are most frequently terminated/amended on the basis of arts. Articles 18.3 and 18.4 of the Federal Law № 39-FZ on Investment Activities in the Russian Federation in the form of Capital Investment of 25.02.1999 ("Investment Law"), as amended by Federal Law № 427-FZ.

These articles stipulate that Contracts (concluded before Jan. 1, 2011 in Moscow and St. Petersburg) may be unilaterally terminated by a state or local authority, state or municipal institution, or unitary enterprise in the event of:

a material breach of the Contract by the investor; and/or

a material change in the circumstances under which the parties entered into the Contract.

For the purposes of the Investment Law, a "material breach" of Contract includes (but is not limited to):

non-performance of the obligations to build/renovate a property during the period provided

in the Contract, and if no deadline is provided within the validity of the construction permit issued in relation to the particular Contract, provided, however, that less than 40 percent of the construction/renovation work on the project is completed by the last day of said period; and

failure to obtain a construction/renovation permit within five years if the Contract does not provide a deadline for completing construction/renovation of the property.

A "material change in the circumstances," under which the parties entered into a Contract includes the inability to perform obligations with respect to construction/renovation of the properties because:

the law prevents the allocation of a land plot; or

because the land plot is encumbered; or

because there is immovable property belonging to third parties on the land that impedes construction/renovation of the property.

With respect to the reimbursement of the investor's expenses under a Contract, in the event of termination by a state or local authority, state or municipal institution, or unitary enterprise, Art. 18.4 of the Investment Law:

provides for reimbursement of documented expenses in the performance of obligations under the terminated Contract, on which interest accrues in accordance with Art. 395 CC RF; and

does not permit compensation of losses, including loss of profit.

Although the provisions of the Investment Law, described above, only entered into force in February 2012, court practice on the termination of Contracts concluded before Jan. 1, 2011 has already formed. In particular, court practice indicates that breaches forming grounds for termination of Contracts under Articles 18.3 and 18.4 of the Investment Law primarily means breaches of construction deadlines, as well as the failure to obtain construction permits on time. However, it should be noted that there is as of yet no specific court practice concerning the reimbursement of an investor's "direct expenses" or recovery of interest under Art. 395 CC RF (as provided in Art. 18.4 of the Investment Law).

Investors in Contracts concluded with the City of Moscow before Jan. 1, 2011 should therefore consider the amendments to the Investment Law as a source of risk for project implementation, and where possible an Investor should fully document their expenses on a project, as well as fully complying with and adhering to construction timetables and deadlines for obtaining construction/renovation permits.

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