

# Top 10 Legal Developments in the Real Estate Market in 2020

29 January 2021

The international law firm Debevoise & Plimpton LLP presents a brief overview on the most interesting and significant developments in Russian legal regulation (including legislative initiatives) and court practice in the real estate, construction and infrastructure sectors in 2020.

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## Legislation

### Reform of the State Support Regimes for Investment Projects (IPPA and Other Support Regimes)

At the beginning of April 2020, a number of bills were passed,<sup>1</sup> which launched a new tool to support investments in the Russian economy, *i.e.*, Investment Protection and Promotion Agreements (“IPPA”).

The bill was originally designed as a single support regime for all investors, essentially as an Investment Code, to replace the outdated and fragmented investments legislation of the 1990s. However, in the process of working on the bill, IPPA became just another measure of state support for investments along with numerous other measures.<sup>2</sup> The main advantage of IPPA is the stabilization of tax and regulatory rules.

The IPPA act<sup>3</sup> provides for the following provisions and benefits for investors:

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<sup>1</sup> Federal Law dated April 1, 2020 No. 69-FZ On the Protection and Promotion of Capital Investments in the Russian Federation (IPPA Law); Federal Law dated April 1, 2020 No. 70-FZ On Introduction of an Amendment to Article 5 of Part One of the Tax Code of the Russian Federation; Federal Law dated April 1, 2020 No. 71-FZ On Introduction of Amendments to the Budget Code of the Russian Federation.

<sup>2</sup> According to our classification, Russian legislation currently includes about 17 different measures for investor support, including (i) contractual (special investment contracts, concession agreements, etc.), (ii) territorial (priority economic development areas, special economic zones, etc.), and (iii) financial measures (state guarantees, project finance factory, etc.)

<sup>3</sup> Implementation of the IPPA Act has already begun—the first agreements were signed in 2020. For example, according to one of the agreements, 28 billion rubles are planned to be invested in the modernization and

- within the framework of IPPA, within 3 years from the date of entry into force no acts or decisions apply to investors that worsen the situation of right holders of state and municipal land plots, tighten requirements for construction, increase environmental payments (*available only to investors who have invested at least 10 billion rubles*) and others;<sup>4</sup>
- the duration of IPPA may be up to 20 years (the maximum possible duration of a particular agreement depends on the amount of an investment) with the possibility of a single extension for 6 years; and
- depending on whether the Russian Federation itself, its constituent entity and/or municipality is a party to IPPA on the part of the state, the rules regulating various taxes (including new rates, the procedure for determining the tax base, terms and procedure for payment, etc.) remain unchanged for the investor for the entire duration of IPPA.<sup>5</sup>

In addition, at the end of 2020, the law on Russia's first federal territory Sirius was passed.<sup>6</sup> Federal territory is a new type of territorial entity for Russia with its own special management system and regulation of activities in specific areas (for example, in Sirius, special regulation may be established for technical norms and rules, urban development, employment of foreign nationals, medical and education activities, etc.) A variety of support measures may be established for those conducting activities in the Sirius territory, including:

- providing subsidies for reimbursement of the interest rate on loans obtained for the creation and operation of the infrastructure;
- subsidizing the costs of paying customs duties in respect of goods (except for excisable goods) imported for the purpose of their use in the construction and technical equipment of real estate objects; and
- subsidizing the costs of paying value added tax on goods needed to carry out scientific and technological activities.

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expansion of mineral fertilizer production in the Leningrad Region. As part of another agreement, the investor has undertaken to invest 55 billion rubles in the reorientation of the oil terminal in the Amur Region into a methanol production plan.

<sup>4</sup> A complete list of such acts and decisions is given in paragraph 3, part 3, Article 9 of the IPPA Act.

<sup>5</sup> VAT is an exception: with regard to it, only the terms of payment and the refund procedure remain unchanged, but the rates may change.

<sup>6</sup> Federal Law dated December 22, 2020 No. 437-FZ On the Federal Territory Sirius.

## What Kinds of Work Can Be Done before Obtaining a Construction Permit?

The Government of the Russian Federation has approved<sup>7</sup> a list of works that the developer and/or involved contractor may perform prior to obtaining a building permit for a facility of federal, regional or local importance after sending the design documentation for expertise.

The following types of work may be performed only if the developer has title documents for the land plot and complies with all applicable norms of urban planning legislation, environmental requirements, waste management standards, etc.:

- preparation of the land plot: clearing of plantations, demolition of facilities;
- fencing of the construction site;
- placement of non-permanent structures to support construction;
- construction of temporary roads and access roads, as well as other types of work listed in the Decree of the Government of the Russian Federation.

## Rules for BIM Models in Construction

In 2020, the work was continued to develop a regulatory framework for BIM modeling in Russia. In furtherance of the relevant provisions of the Town Planning Code of the Russian Federation,<sup>8</sup> the Russian Government approved the rules for the development and maintenance of the information model of a capital construction facility (BIM-model).<sup>9</sup>

The documents to be included electronically in the BIM-model of the facility at each stage of construction have been established:

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<sup>7</sup> Decree of the Government of the Russian Federation dated November 7, 2020 No. 1798 On Approval of the List of Types of Preparatory Work Not Causing Significant Harm to the Environment and its Components, Which May be Performed Prior to Obtaining a Building Permit for a Facility of Federal, Regional or Local Importance from the Date of Sending the Design Documentation of these Facilities for Examination of Such Design Documentation, the Order of Such Types of Work, as well as Environmental Requirements for the Performance of Such Types of Work.

<sup>8</sup> In 2019, Articles 57.5-57.6 were included in the Town Planning Code of the Russian Federation, establishing the basis of legal regulation of the information model of a capital construction facility (BIM model).

<sup>9</sup> Decree of the Government of the Russian Federation dated September 15, 2020 No. 1431 On Approval of the Rules for the Development and Maintenance of the Information Model of a Capital Construction Facility, Structure of Data, Documents and Materials Included in the Information Model of a Capital Construction Facility and Submitted as Electronic Documents, and Requirements to Format of Such Electronic Documents, as well as Amendments to Paragraph 6 of the Provision on Engineering Research for Preparation of Design Documentation, Construction, Reconstruction of a Capital Construction Facility.

- for example, at the design stage—the information, documents and materials included in the sections of the design documentation, the graphic part of which is made in 3D;
- at the construction stage—among other things, the documents and materials included in the executive documentation and the graphic part of the executive documentation, made in 3D.

The developer, technical customer and contractors can develop and maintain a BIM-model with regard to the work they perform, for which any software and (or) technical means can be used, provided that a number of conditions specified in the above Decree of the Government of the Russian Federation are met.

### **Annulment of the Mandatory Nature of 30% of Construction Norms and Regulations (SNiPs)**

The Government of the Russian Federation has updated the list of national standards and rules, the mandatory application of which ensures compliance with the requirements of Technical Regulations on the Safety of Buildings and Structures. Redundant and duplicative SNiPs were eliminated from the new list,<sup>10</sup> resulting in 30% fewer mandatory requirements. The abolition of redundant SNiPs will simplify the development and verification of construction documents and accelerate the implementation of a construction project.

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## **Court Practice**

### **There Is No Way to Compel a Tenant Who Has Lost Interest in a Lease Contract, to Move in the Premises**

The Supreme Court of the Russian Federation in one case prohibited the application of the specific performance against a tenant who withdrew from the lease agreement he had entered into before and did not move in the premises, having lost interest in it.

Thus, in its Ruling,<sup>11</sup> the Supreme Court pointed out that the tenant is a creditor under the obligation of the landlord to provide the premises. Accordingly, the tenant's refusal to move in the premises should be considered a creditor's default, which should be compensated to the debtor (the landlord) through payment of damages, but not the

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<sup>10</sup> Decree of the Government of the Russian Federation dated July 4, 2020 No. 985 On Approval of the List of National Standards and Rules (Parts of Such Standards and Rules), the Application of Which on a Mandatory Basis Ensures Compliance with the Requirements of the Federal Law "On Technical Regulations on the Safety of Buildings and Structures" and the Repeal of Certain Acts of the Government of the Russian Federation.

<sup>11</sup> Decision of the Judicial Board for Economic Disputes of the Supreme Court of the Russian Federation dated June 26, 2020 in case No. 305-ЭС20-4196, А40-285997/2018.

specific performance of the obligation. Thus, the Supreme Court overturned the decisions of the lower courts in terms of obliging the tenant to move in the premises.

In this regard, it is recommended that other protection measures (*e.g.*, penalties) be included in lease agreements against the possibility that the tenant refuses to move in the leased premises.

### **The Contractor's Guarantee Obligations for Work Performed Are Transferred to the New Contractor in Full in Case of Assignment of an Agreement**

The customer demanded that the new contractor rectify the defects in the work performed by the previous contractor, and after the new contractor refused to do so, he assessed him a penalty and applied to the court for its recovery.

The defendant (the new contractor) noted that when it signed the contract assignment agreement, it assumed only the obligations of the former contractor not fulfilled prior to the date of that assignment agreement. Since the deficient work had already been performed by the former contractor prior to the date of the contract assignment agreement, it was not, according to the defendant, part of the scope of his assigned duties.

The Supreme Court overturned<sup>12</sup> the decisions of the lower courts and supported the customer. The court emphasized that since the agreement provided for the assignment of the entire contract, including the guarantee obligations, without excluding any rights and obligations, the conclusion that only duties and responsibilities with respect to the remaining work not performed by the previous contractor at the time of the agreement were transferred to the defendant was erroneous. If the parties intended to assign only part of the obligations to the new contractor, they should have expressly provided for this in the contract assignment agreement.

It should be noted that, the opinion of the Supreme Court is applicable only for situations of assignment of construction contracts, but not termination of a previous contract and conclusion of a new one.

In case of the assignment of the contract to a new contractor, the following is recommended:

- to make sure that the new contractor has the ability and resources to fulfill its obligations, including eliminating deficiencies in previously completed work;

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<sup>12</sup> Decision of the Judicial Board for Economic Disputes of the Supreme Court of the Russian Federation dated August 11, 2020 No. 309-ЭС20-1152 in case No. А60-11259/2019.

- to formalize the assignment of the contract as a tripartite agreement between the customer, the original contractor and the new contractor; and
- for the sake of clarity, to provide for provisions on the future of guarantee obligations for previously performed work, including the obligation to actually eliminate detected and undetected deficiencies (including attaching a detailed list of such deficiencies), as well as liability measures (remaining with the original contractor, assignment to the new contractor in full, joint and several liability of both contractors).

### **Contractor's Work and Labor Does Not Mean That the Materials Brought to the Site by the Contractor Belong to the Contractor**

Under the terms of the contract, the contractor undertook to perform the work using its own materials, by its own efforts and means. Subsequently, due to the contractor's failure to meet deadlines, the customer withdrew from the contract. The contractor sued the customer for recovery of the amount of unjust enrichment in the amount equivalent to the value of purchased materials and equipment left at the construction site.

The lower courts accepted the contractor's argument that it owned the disputed materials and equipment, and satisfied the contractor's claims in full.

The Supreme Court of the Russian Federation, however, overturned<sup>13</sup> these decisions, noting that the courts had not investigated who was an owner of the disputed property, so the issue should be resolved during the new proceedings (including in order to eliminate possible claims of subcontractors in the future), and it should be taken into account that the contract was terminated by the parties due to its improper performance by the contractor.

To avoid such uncertainty in the issue of materials and equipment brought to the construction site by the contractor, the following is recommended:

- to clearly indicate in the contract who is the owner of the materials and equipment brought to the construction site, and, if it is the customer, the moment of transfer of ownership (for example, the moment of acceptance of materials and equipment at the site or the signing of the acceptance certificate);
- to separately specify in the contract which party bears the risk of accidental loss and/or damage to the materials and equipment. For example, even after the transfer

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<sup>13</sup> Decision of the Judicial Board for Economic Disputes of the Supreme Court of the Russian Federation dated July 8, 2020 No. 308-ЭС20-4069 in case No. A32-18667/2019.

of ownership to the customer, it is possible to leave the risk with the contractor until the end of the construction project; and

- to specify in detail in the contract the consequences of its termination for any reason. For example, the parties may agree that if the contract is terminated through no fault of the customer, the customer shall not pay to the contractor any amounts of damages, compensation, fines and/or other payments, except for payment for work performed and duly accepted. In addition, it is possible to directly establish the abandonment of materials and equipment purchased for the project by the customer as a counter claim against the customer with respect to any of its non-performed obligations and breaches.

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## Legislative Initiatives

### **Massive Changes in the Federal Law on State Registration of Real Estate**

The State Duma passed in the first reading a bill<sup>14</sup> containing a number of amendments to Federal Law No. 218-FZ dated July 13, 2015 On State Registration of Real Estate.

#### **Registration of the lease of a part of the property without a technical (demarcation) plan**

The bill proposed to simplify the procedure for registering a lease agreement for a part of a land plot, building or structure.

At the moment, the cadastral registration of the leased part is carried out during the registration of the lease agreement, and according to the practice of the registration authorities, the parties to the lease agreement should provide the technical (demarcation) plan of part of the land plot or building to perform the registration. The bill allows registering lease agreements for a part of a property without simultaneous cadastral registration and, accordingly, without the need to provide the technical (demarcation) plan.

#### **Possibility of state registration of the transfer of ownership upon the application of the buyer**

Registration of the transfer of ownership rights to immovable property upon the buyer's application is possible only, if at the time of filing the application the seller (legal entity) is liquidated or excluded from the Unified State Register of Legal Entities as

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<sup>14</sup> The full text and status of bill No. 962484-7 On Amendments to Federal Law On State Registration of Real Estate and Other Legislative Acts of the Russian Federation in the Field of State Cadastral Registration and State Registration of Rights (on Improvement of the State Registration of Real Estate) is available at: <https://sozd.duma.gov.ru/bill/962484-7>.

inactive. In this case, the buyer's application should be accompanied by an extract from the Unified State Register of Legal Entities, confirming the liquidation or exclusion of the legal entity, as well as documents confirming the performance of the sale and purchase agreement by the parties.

**Simplification of the procedure for filing a number of applications in electronic form**  
Certain applications not related to the state registration of the transfer of rights can be submitted by right holders through their personal account without the use of an enhanced electronic signature. For example, this refers to an application for state cadastral registration in connection with a change in the basic information about the property, the state cadastral registration and state registration of ownership rights to a private residential building, garden house, etc.

### **The Size of the Aerodrome Environs, in Which Construction Is Restricted, May Be Reduced**

Earlier in our reviews, we reported on the adoption of the law<sup>15</sup> providing for the allocation of 7 subareas in the aerodrome environs, in respect of which the relevant restrictions on the use of land plots and/or real estate located therein are established.<sup>16</sup> Since then, there has been much discussion about the 7th subarea, the largest and furthest away from aerodromes, as it involves significant restrictions on construction that apply to a large area.

The Ministry of Transport in the published bill<sup>17</sup> proposes to allow the possibility of establishing not the entire territory of aerodrome environs at once, but only subareas from 1 to 6 (partially established territory of aerodrome environs). At the same time, the obligation to establish the 7th subarea is proposed to postpone until January 1, 2025. Thus, if the current version of the bill is adopted, a significant amount of areas around airports may be built up in the coming years.

### **Further Digitalization of Construction**

In accordance with the Development Strategy of the Construction Industry until 2030,<sup>18</sup> the digitalization of the construction industry will continue in the upcoming years, during which, among other things, the following is envisaged:

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<sup>15</sup> Federal Law No. 135-FZ dated July 1, 2017 On Amending Certain Legislative Acts of the Russian Federation to Improve the Procedure for Establishing and Using Aerodrome Environs and Sanitary Protection Zone.

<sup>16</sup> Our review of Top 5 Legal Developments on the Real Estate Market in H1 2017 is available at: <https://www.debevoise.com/insights/publications/2017/09/top-five-legal-developments-in-the-russian?translationGuid=3fc1f1b8-96ef-45ae-8255-38365f2e785c>.

<sup>17</sup> The full text of the bill is available on the portal of draft normative legal acts: <https://regulation.gov.ru/p/108201>.

<sup>18</sup> The full text of the Strategy is available at: <http://stroystategy.ru/>.



- development of a digital platform of the Institute of Construction Examination that allows to store the conclusions of the state examination, as well as BIM-models of capital construction facilities with the possibility of selecting structural elements, parameters and other attributes in digital format for future use;
- further implementation of BIM-models, including the development of a regulatory framework for 3D description of buildings and structures, determination of the possibility of and procedure for developing the technical plan as part of information modelling, introduction of the right to submit the information model for examination as part of the design documentation with the possibility of reducing the cost and time of the examination, digitization of the records maintenance process, etc.;
- digitization of procedures in the area of construction;
- creation of a system of digital archives of urban planning information, providing storage of information and documents in electronic form, approved, provided to market participants in the implementation of urban planning, public search and reference platforms in all key areas of urban planning activities.

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We will be happy to answer any questions you may have on this subject.

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