

Foreign Jurisdictions and Architects' Liability

WHEN THE WORLD IS NOT ENOUGH

Almost every liability (professional or otherwise) insurance policy has a territorial or jurisdictional limit, often referred to in terms such as “Your Policy Territory”. Some policy territories can be relatively narrow (“actions arising in the Province of Ontario”, for example), others broader or even global, with wording such as “The Insurer’s obligations under this Policy apply to Claims arising out of actual or alleged acts which occur anywhere in the world.”

You might be tempted to think that “anywhere in the world” means you have coverage anywhere in the world.

You are probably wrong.

There are at least two reasons you are probably wrong.

First, many liability policies cover you for acts that occur anywhere in the world but only if the resulting lawsuit is brought within the defined jurisdiction. This might look something like, “The Insurer’s obligations under this Policy apply to Claims arising out of actual or alleged acts which occur anywhere in the world provided that in the case of an act occurring outside of Ontario, Claims are made and proceedings are instituted in the Province of Ontario.”

Second, even if there is not a jurisdictional limit built into the policy, there are legal limits. Canada maintains a list of sanctioned countries, companies, and individuals that Canadian companies cannot do business with. This means your insurance company cannot transact with them either, including engaging local lawyers or making claims payments. In addition, most financial institutions operate internationally and, therefore, follow EU and/or USA sanctions as well. So even countries that Canada is OK with doing business with might very well be blocked because funds cannot flow to the country, company or individual.

For example, as of April 1, 2022, Pro-Demnity Insurance Company is barred from conducting business in Iran, Syria, Cuba, North Korea, North Sudan, Crimea, Venezuela, Russia, Ukraine, and Belarus.

These lists change over time – they are largely driven by political forces rather than economic ones – and you also need to pay attention to them from your own business perspective of where you choose to do business.

What To Do

There are several actions you can and should take in managing the risks associated with foreign projects. Specifically related to sanctions, some actions to take include:

- Consult your lawyer to ensure you are not violating current law by engaging in a foreign project.
- Ask your lawyer about what happens if the rules change part way through a project and the jurisdiction (or individual or company you are working with) gets added to a sanctions list. Does your lawyer recommend a Termination clause allowing you to cancel your obligation with no penalty should that event happen? How will you get paid in such a circumstance, and in what currency?
- Talk to your current insurer about what they can do to help. For your professional liability with Pro-Demnity, for example, we can sometimes add foreign jurisdiction coverage. Although these endorsements cannot address sanctioned countries, individuals or companies, they may be able to address some other local issues.
- Consider arranging local insurance in the jurisdiction you are operating in. This can be challenging as insurance rules and practices (and availability of products) varies significantly around the world. Just because a product might have the same or a similar sounding name does not mean it is the same thing. Insurance law also varies significantly, so ensure you understand your rights and entitlements under local law. Use an agent or broker who does business in the jurisdiction you are going into, so that they know the local practices, terminology, and language.

Foreign projects always involve some level of heightened risk, and we always recommend you engage legal counsel familiar with (and licenced in) the jurisdiction where you are working. This includes “friendly” jurisdictions like the USA, UK, etc.: a legal issue in London UK is very different than a legal issue in London ON.

Foreign projects can be a great opportunity ... for either great success or great failure. Sometimes, winning a foreign project is a steppingstone to expanded opportunities; sometimes it is an indication that the local firms know something you do not know. Do your homework, know your strengths and capabilities, and be prepared. An important part of that preparation should be a careful look at the impact of sanctions and other international restrictions.