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EPC CONTRACTS: PROSPECTS FOR CONCLUSION IN UZBEKISTAN

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ABSTRACT

The national contract law issues in the construction industry are the focus of this study. The author compares the English and national legal systems as they relate to construction contracts. In accordance with the guidelines established by the International Federation of Consulting Engineers, a recognized global standard for EPC contracts, the article looks at the legal frameworks utilized when signing an EPC (engineering, procurement, and construction) contract. It is suggested that the foreign model's shown benefits be included into the country's contractual practices.

Key words: *EPC contracts, construction contract, unification of law, contract law.*

The realization of large-scale construction projects, either international or of public private partnership comprises the complex of massive works on engineering, procurement and the construction of the building¹. In international practice these components are inserted in the single contract known as EPC (Engineering, procurement and construction). The model of EPC contract frequently called “turnkey contract” due to the multifunctionality has gained popularity with foreign construction

¹ EPC as a new form of regulation of the relationship between the contractor and the client. Risk of recognition of the EPC contract as not concluded. // URL: <https://lawfirm.ru/news/index.php?id=5382> (available at: 26.01.2021).

companies, especially specialized in oil and gas industry¹. Thus, international and regional industry associations elaborated sample contracts, well-known one is Silver Book, prepared by The International Federation of Consulting Engineers (as referred to FIDIC) as amended in 2017. Silver Book contains Conditions of Contract for EPC Turnkey Projects.

Creating standard contracts intended to achieve uniform contractual practice between foreign counterparts, including cooperation with African and Asian countries, that have feeble system of construction law.

The lawyers fail to find single opinion about legal nature of EPC standard contracts. Legal conceptions elaborated by the FIDIC are usually reckoned as soft law or international construction law customs². Despite this, legal conceptions are commonly used for contract drafting. Forms proposed by FIDIC stand out due to flexibility, as they are easy to adapt to national legal systems, as well as the wide range of legal concepts. Standard contracts allow specifying certain clauses subject to national law, making thereby the application of legal conceptions by foreign companies available whatever the features of national contractual law. Nonetheless, a standard contract was created based on English contract law, which legal concepts are not immanent to other legal systems. This feature is significant especially in the case of litigation in national courts. For instance, liquidated damages are construed unambiguously by courts of not English law system.

At the same time counterparties have a great number of options this or that regulation as regards way of payment, extension of deadlines etc., that allows parties to compromise with achievement fair terms³.

In national legal system the analogy of EPC absents and the same contracts on engineering, procurement and the construction of the building are concluded under

¹ EPC Contracts in the oil and gas sector // URL: <https://www.pwc.com/au/legal/assets/investing-in-infrastructure/iif-5-epc-contracts-oil-gas-feb16-3.pdf> (available at: 27.01.2021).

² EPC contractor: engineering and construction. // URL: <https://engineeringtsk.com/articles/inzhiniring/ers-podryadchik-inzhiniring-i-stroitelstvo/> (available at: 27.01.2021).

³ FIDIC Construction Contracts. // URL: <https://a-p.legal.ru/2013/12/30/kontrakty-fidic-na-stroitelstvo-dopolnennaya-statya-dlya-zhurnal/> (available at: 26.01.2021).

the Civil Code of the Republic of Uzbekistan, that specifies the services agreement (engineering services), equipment contracts, construction contract.

There is no omnipresent usage of EPC contracts in Uzbekistan, counterparties deviate from the standards and mix EPC models of contracts and its' types. So, Silver Book failed to gain popularity on the national construction market¹. The obstacle is not only trenchant differences of legal concepts, but several objective causes. At first sight the conclusion of EPC contract seems to be obviously beneficial than a complex of contracts under civil law.

“Turnkey” contracts, prescribed by Silver Book (2017) excel thanks to clear structure and one of the major principles is the requirement to establish obligations and rights in the section “Generally”, while other conditions must not infringe the balance of risk distribution between the parties, which are specified in general provisions.

Contracts EPC excel due to the strict liability of a contractor because of imposing many risks on him¹⁰, that influences the way of payment the contract. The price of “turnkey” contracts includes besides the costs of work, paying for specific risks. Depending on what risks are implied by the parties, the ways of payment can be lump sum turnkey price, cost-reimbursable, unit price.

Lump sum turnkey price is known as the most common method. It means that one must pay fixed sum including unforeseen costs for coverage of risks. Cost overrun risk is also to be included in the price, that means unforeseen growth of expenditures². Despite limited opportunities for a client to control, he may establish the limit of the expenditures' growth when he details the provisions about risks. In other words, total price doesn't depend on actual costs for work³. Generally, this price isn't to be reviewed. A contractor is granted an additional fee for taking certain risks. The Civil

¹ Malakhov V.I. EPCM contracts - transitional forms for new conditions. // URL: https://www.cfin.ru/management/strategy/holdings/transitional_forms.shtml (available at: 26.01.2021).

² H. Randolph Thomas & Ralph D. Ellis, Interpreting Construction Contracts: Fundamental Principles for Contractors, Project Managers, and Contract Administrators. - American Society of Civil Engineers, 2007. - pp. 464.

³ Huse J. Understanding and Negotiating Turnkey and EPC Contracts. - Sweet & Maxwell, 2002. - pp. 973.

Code of the Republic of Uzbekistan provides a discretionary rule, which allows payment before or after the acceptance of construction work, advance payment and down payment are permitted as well. The rules of the Civil Code of the Republic of Uzbekistan set forth the guarantee of the payment by a client for the actual performance or sum fixed in the contract.

National approach to establish the price of a contract implies the accurate cost of work with deviating from it in exceptional cases.

Under Silver Book (2017) another instrument to control by the client, in particular, the terms of work performance, is predetermined compensation for violation of the deadlines in the form of a penalty for each day of delay. Such penalty is a strict measure because except penalty for failure of the performance the counterparty must reimburse the expenditures, that caused by insurance, supervision of the construction, financial losses and loss of profits for each day of delay. According to the Civil Code of the Republic of Uzbekistan the consequence of the failure of terms is specified in general provisions of obligations that set forth the obligation to pay damages in case of losing interests of a client.

Setting forth unforeseen circumstances under FIDIC, as well as customer liability for project development, fixed contract price are undoubtedly the merits of an EPC contract, for which it is characterized as a "turnkey contract". The Silver Book standard deserves attention due to the fact that the contract can be adapted to national law. The parties are provided with a wide range of English contract law legal instruments, which allows counterparties to find the most acceptable version of the agreement and speaks of the development of construction law abroad.

At the same time, the concepts used in the classic EPC contracts are already being used in national practice, subject to the peculiarities of national law. The regular application of liquidated damages is a clear example. Thanks to judicial practice, the English concept of damages is expected to be entrenched in the national legal system. Although the FIDIC standards are aimed at unification, in case the EPC concepts are successfully rooted in the national legal system, the prospects for the convergence of

national construction law with international standards in the field of contract law will be obvious. In particular, it is rewarding to consider foreign experience in relation to a fixed contract price and the number of risks, which would be a guarantee of the partner's reliability, and, consequently, protection against the risk of bankruptcy. In the future, national companies are projected to hail the mentioned legal concepts, the emergence of new contractual strategies in the national construction market, and, possibly, the reform of the classic construction contract under the Civil Code.

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