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# Experience of conclusion and performance of engineering, procurement and construction contracts in post-Soviet countries

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## Abstract

The main purpose of the article is the analysis of properties and risks arising during the conclusion and performance of engineering, procurement and construction contracts (hereinafter referred to as EPC contracts) in Ukraine, Kazakhstan, Russia and Belarus, notwithstanding the current situation with military aggression and sanctions. The methodological basis of the study consists of the comparative legal and structural-logical method, systemic analysis and synthesis. It also describes the ways of relevant adaptation of EPC contracts in accordance with the requirements of the legislation. In addition, the authors have studied in detail the legal instruments that could help the contracting parties to establish the control due to occurrence of risks in different jurisdictions of the post-Soviet space. Finally, it was concluded that the application of EPC contracts, in the countries of the post-Soviet space, is connected with the presence of high level of political risks that should be taken into account when carrying out large-scale infrastructural projects. The results of the

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study will be useful to practicing lawyers, students and scientists who are interested in the examination of public relations in the field of civil works with some political influence on the development of this sector.

**Keywords:** contract enforcement; capital construction; contract law; civil engineering; post-Soviet countries.

## Experiencia de celebración y cumplimiento de los contratos de ingeniería, compras y construcción en los países postsoviéticos

### Resumen

El objetivo principal del artículo es el análisis de propiedades y riesgos que surgen durante la celebración y cumplimiento de contratos de ingeniería, compras y construcción (en lo sucesivo contratos EPC) en Ucrania, Kazajstán, Rusia y Bielorrusia, sin perjuicio de la situación corriente con la agresión militar y sanciones. La base metodológica del estudio consiste en el método comparativo jurídico y estructural lógico, análisis sistémico y la síntesis. También se describe los modos de la adaptación pertinente de contratos EPC, de conformidad con los requisitos de la legislación. Además, los autores han estudiado detalladamente los instrumentos jurídicos que podrían ayudar a las partes contratantes a establecer el control debido al ocurrir riesgos en diferentes jurisdicciones del espacio postsoviético. Finalmente se llegó a la conclusión que la aplicación de contratos EPC, en los países del espacio postsoviético, está relacionada con la presencia de alto nivel de riesgos políticos que deben tenerse en cuenta al realizar proyectos infraestructurales de gran tamaño. Los resultados del estudio serán útiles a los abogados en ejercicio, estudiantes y científicos que están interesados en el examen de las relaciones públicas en el ámbito de las obras civiles con alguna influencia política en el desarrollo de este sector.

**Palabras clave:** cumplimiento de contratos; construcción de capital; derecho contractual; ingeniería civil; países postsoviéticos.

### Introduction

In recent years, the area of analysis and adaptation of contracts developed by the International Federation of Consulting Engineers (hereinafter – FIDIC) became highly interested among practicing lawyers.

This is primarily connected to the fact that a number of infrastructure and energy projects have been implemented with the help of EPC-contract forms, created by FIDIC.

FIDIC model contracts were prepared by the International Federation of Consulting Engineers (Fédération Internationale des Ingénieurs-Conseils). There are 9 basic FIDIC model contracts covering a broad range of contractual relations in construction, the most popular being the Red Book (design by the employer), Yellow Book (design by the contractor), Silver Book (turnkey projects), and Pink Book (adapted to the requirements of international financial institutions).

Silver Book «Condition for Contract for EPC Turnkey, First Edition» occupies a special place among the mentioned-above list. It uses for the construction a fully equipped and ready-to-use power plants, factories or infrastructure facilities from A to Z. This form of agreement has given a fresh impetus to the development of standard turnkey capital construction contracts and popularized the EPC (Engineering, Procurement, Construction) contract model.

As world practice has shown, the use of the FIDIC standard helps to significantly increase the efficiency of construction projects, and the use of EPC-contract ensures fluency, transparency of construction project management, and equitable allocation of the risks between employers and contractors with a reduction of delays and cost overrun.

Model FIDIC contracts are not binding and their application is voluntary for the parties, but many foreign companies successfully use them in business. It should be noted that parties are free to decide which edition of a particular book they intend to use. For example, the parties can choose the Silver Book in the 1999 or 2017 edition.

All of the above-mentioned factors contribute that EPC-contracts are now gaining popularity in such countries as Ukraine, Belarus, Kazakhstan and Russia. Definitely, such trends have caused an incredible interest in the scientific community regarding features of EPC-contracts using and the mechanisms of their proper adaptation to the requirements of national legislation. This scientific article is focused on the study of these issues.

At the same time, Russia's military aggression against Ukraine which began on February 24, 2022, posed new challenges to the economy of the country due to the prolonged nature of the warfare. The consequences of this tragic situation for Ukraine, which affected the field of capital construction according to the concept of EPC, will be analyzed in this study as well.

## 1. Methodology of the study

Analysis of concluding experience and implementation of EPC-contracts in the Post-Soviet Union States involves the use of several leading approaches of scientific knowledge. The main of them are based on the following methods: system analysis, synthesis, comparative legal and structural logic, etc. Among the general scientific methods of cognition in the study of «EPC-contract nature», the method of system analysis played a significant role in identifying the key features and finding out the role of FIDIC contracts in the field of capital construction.

It was carried out an analysis of existing legislation researches regarding EPC-contract use in Ukraine, Russia, Kazakhstan and Belarus in view of the fact that capital construction regulations and contract law in those countries are largely similar. Also, the synergetic method helped to combine the results of the research in the scientific and practical fields. The comparative law method has been also used to compare the rules of law from different jurisdictions.

The application of the system analysis and synthesis methods helped to identify common and distinctive features in the approach to the use of EPC-contracts within the relevant jurisdictions, considering that the above-mentioned states belong to the Romano-Germanic legal tradition. This stems from the fact that belonging to the same legal tradition (family) does not make the identical legislative approach for different states, which significantly complicates the process of EPC-contracts adaptation with the aim of universalizing its provisions.

Also, the method of legal modelling was also applied, which aimed to study a certain phenomenon (model) that arises in one or another country, in particular, attention is paid to the prospects of further use and execution of EPC-contracts in the conditions of full-scale armed aggression of the Russian Federation. This method helped to analyze existing problems in the industry and outlined the range of prospects for its further development.

## 2. Analysis of recent research

There are an insignificant number of studies that are focused on the issues of concluding and executing of EPC-contracts in the Post-Soviet Union States. Basically, researches are related to a general overview of the practice of applying the FIDIC contracts provisions in a particular jurisdiction. Such studies are caused by the efforts of individual states to improve legislation identically to the standards of Eurocodes (Kazakhstan) or targeting the aim to make FIDIC standard forms more applicable within the rules of the national law (Ukraine, Belarus, Russia).

Provisions of the Ukraine, Belarus, Kazakhstan and Russian legislation as well as the rules of international law make the empirical basis of this research. The empirical basis also includes analysis of practical cases and best market practices. It also consists of regulatory and legal acts that were developed to improve the implementation of FIDIC contract provisions and the involvement of the legal environment.

These might include Methodological recommendations for the application of standard FIDIC contracts taking into account the requirements of the Republic of Belarus legislation in the field of construction, approved by the Decree of the Ministry of Architecture and Construction of the Republic of Belarus No. 67 dated July 07, 2021 (Decree No. 67, 2021), Decree of the Cabinet of Ministers of Ukraine (On amendments to the general conditions for the conclusion and execution of contracts in capital construction) No. 224. dated March 17, 2021 (Decree No. 223, 2021), etc.

The theoretical foundation of this research is based on the works of theoreticians and practicing lawyers that are connected with the study of EPC-contracts and the possibility of their adaptation within the legislation of the respective country. For example, K. Sabirov and Y. Yesimkhanov explore contradictions between the rules of Kazakh legislation and provisions of EPC-contracts, developed by FIDIC (Sabirov, 2018; Yesimkhanov, 2013). The practical application of EPC-contracts in Ukraine was analyzed in studies by S. Teush (Teush, 2013, 2018), I. Sukhostavets (Sukhostavets, 2019) and M. Hritsyshyna (Hritsyshyna, 2021) and a similar study about Kazakh legislation was made by A. Idayatova (Idayatova, 2019).

On the other hand, V. Varavenko has made a comparative legal analysis of FIDIC contracts (including EPC-contracts) and provisions of Russian legislation (Varavenko, 2019). V. Lypavskiy together with colleagues, carried out a study of the practice of the EPC-contracts application in the Russian Federation (Lypavskiy, 2019).

Also, specialized research regarding the legal and practical aspects of EPC-contracts using in renewable energy area was made by V. Ostrynskyi, N. Nykytchenko and other scientists (Ostrynskyi *et al.*, 2022). The authors have analyzed the main aspects of EPC-contracts adaptation and made practical recommendations for concluding such contracts while construction of renewable energy facilities in Ukraine.

### 3. Results and Discussion

#### 3.1. EPC-contract: definition, basic characteristics and concluding features

In the Post-Soviet Union States, relations in the field of capital construction are developing at a rapid pace, national legislation does not have time to carry out its proper legal regulation, which forces business entities to use the norms of foreign jurisdictions or pro formas developed by international specialized organizations for contractual transactions. These also had been encouraged by international investors, which know that the legal systems of Ukraine, Belarus, Russia, Kazakhstan, etc. are imperfect, so they try to protect their own capital and investments as much as possible. Therefore, nowadays, legal scholars are paying a lot of attention to EPC-contracts, the main lobbyists of which are international investors.

The legal nature of EPC-contracts is pretty complicated. For example, S. Oberkovych. notes that there is no separate analog of the EPC-contract in Ukrainian legislation. From the point of Ukrainian law, EPC is a mixed contract containing the terms of several contracts: provision of engineering services, construction contract, execution of design works, and goods supply. Therefore, in the case of EPC-contract subordination to Ukrainian law, legal requirements for all the above-mentioned contracts shall be reflected in the text of the agreement (Oberkovych, 2019). We also need to point out that model forms of FIDIC contracts and EPC-contract as well, contain definitions that do not correspond to the legislation of Ukraine.

1. Goddard interprets the term “EPC-contract” through the disclosure of its subject composition. In particular, the scientist notes that EPC-contractor is a general contractor who performs the main scope of work for a «fixed price» and takes all the risks of its implementation from the moment of design to the moment of handing over the finished object to the employer (including the fulfilment of warranty obligations and financial responsibility).
2. The EPC-contractor manages certain types of “own” works and does not have an opportunity to manage the project as a whole. Also, the scientist notes that, as a general rule, an EPC-contract should be understood as a contract for the construction of a “turnkey” facility with a fixed (lump) sum (Goddard, 2018).

In the view of V. Lipavskiy, EPC-contract is “full-cycle” agreement, according to which the contractor is responsible for the engineering, supply, construction, and commissioning of the facility. The EPC-contract is usually used in cases when the employer does not have enough human

resources which able to manage the construction project or doesn't want to be involved in such management to share the relevant risks. Also, EPC is one of the main contractual forms in projects that are financed with the help of banks or other financial institutions (especially with regard to project financing), because creditors are likely when the developer (the employer) takes as few risks as possible (Lypavskiy, 2020).

A somewhat pragmatic approach has I. Chumachenko, who reduces the concept of EPC-contract to a combination of the general contractor and general designer role in one person, but at the same time highlights the feasibility of such a combination only in cases of implementation of a large-scale infrastructure project in which there is a need of deadline control for the performance of works. In other cases, the legal practitioner advises dividing the development of project documentation and its implementation between different entities to ensure dispassionate control over the implementation of construction works by the general contractor (Chumachenko, 2015).

According to I. Sukhostavets, the legal nature of EPC-contracts is quite polemic. Some researchers consider that such contracts belong to the so-called "soft law" or "non-legal soft law", others attribute these proformas to the "lex constructionis" – a system of non-governmental regulation of international construction contracts, which reflects the trade customs as well as typical conditions of international construction contracts. In accordance with "lex constructionis", FIDIC develops recommendations in the form of proformas, model contracts, standard regulations, and legal adjustments used by customers and contractors while concluding contracts for the realization of capital construction projects (Sukhostavets, 2019).

Therefore, summarizing all the mentioned above, it is possible to identify the main features that lawyers most commonly characterize EPC-contracts:

- shall be concluded in writing only;
- suitable for construction of the facility on a «turnkey» basis, for which it doesn't contain a closed list of rights and obligations, which results in allocation a lot of project risks on the contractor;
- always has a lump sum (fixed price), which could be changed only at the initiative of the parties.
- delay in the execution of one of the parts of the EPC-contract may lead to increasing the terms of project execution as a whole (for example, a delay in the design leads to a delay in the start of delivery or construction);
- usually governed by rules of English law;
- can be expanded or amended by additional contractual constructions, for example representation, loan provisions, credit, etc;



- contains provisions for limitation of liability for the parties;
- the employer has a limited list of powers related to the impact on the EPC-contractor or subcontractors;
- violations made by subcontractors do not entitle the contractor to postpone project implementation dates or exempt from liability;
- engineering, supply, and construction shall be performed simultaneously which significantly reduces the terms of project implementation in comparison with construction using the multilot/multi-prime approach.

One of the main principles that allows the conclusion and execution of EPC-contract is freedom of contract, which provides the parties with the right to choose the type of contract, in particular by concluding a mixed contract. In Ukrainian legislation, the principle of freedom of contract is enshrined in article 627 of the Civil Code of Ukraine (hereinafter – CCU), which stipulates that according to article 6 of CCU the parties are free to enter into a contract, choose a counterparty and determine the terms of the contract, taking into account the requirements of the CCU and other acts of civil legislation, business practice, requirements of reasonableness and fairness (The Civil Code, 2003: article 627).

While analyzing this legal rule, it became clear that in terms of the way the content is presented, it is referential and blanket, because it contains a reference to both specific legal rules and the legislation as a whole. Therefore, article 627 of CCU can be a classic example, of when the “spirit of the law” is wider than the “letter of the law”.

A similar principle is enshrined in article 421 of the Civil Code of the Russian Federation (The Civil Code of the Russian Federation, 1994: article 421), article 380 of the Civil Code of Kazakhstan (The Civil Code of Kazakhstan, 1994: article 380), and article 391 of the Civil Code of the Republic of Belarus (The Civil Code of the Republic of Belarus, 1998: article 391). Moreover, the wording used in the last two Civil Codes is, for the most part, identical, which once again indicates the similarity of the approach to the regulation of social relations in these states.

The principle of freedom of contract plays a key role in the development of economy and market relations. However, the operation of the principle of freedom of contract has certain exceptions, assigned in legislative norms. For example, article 380 of the Civil Code of the Republic of Kazakhstan prohibits compulsion to conclude a contract, while clarifying that this does not apply to cases where the obligation to conclude a contract is provided for by the legislation or a voluntarily accepted obligation (Sabirov *et al.*, 2020).

The Belarusian legislator has provided the principle of freedom of

contract with the following content in article 22 of the Civil Code: “Citizens and legal entities are free to conclude a contract. The compulsion to conclude a contract is not allowed, except when the obligation to conclude a contract is provided for by the law or a freely assumed obligation” (The Civil Code of Respublika of Belarus, 1998: article 22). N. Bondarenko emphasizes, that such wording of the law should be declared unfit. The principle of freedom of contract cannot be reduced to the freedom to enter into contractual relationships only. It works at all stages of contractual relations until termination thereof. Freedom of contract enables parties of the contractual relationship to initiate succession, entering into a claim assignment or debt transfer agreement (Bondarenko, 2016).

At the same time, the possibility of implementing the principle of freedom of contract by business entities is a starting point that allows the conclusion of the mixed contract on the territory of the Post-Soviet States, which in particular, includes EPC-contracts.

According to the general approach, EPC-contracts consist of two parts: General Conditions and Particular Conditions. In order to avoid disagreements during the execution and conclusion of it, FIDIC had made so-called “Golden Principles”:

GP1: The duties, rights, obligations, roles and responsibilities of all the Contract Participants must be generally as implied in the General Conditions, and appropriate to the requirements of the project.

GP2: The Particular Conditions must be drafted clearly and unambiguously.

GP3: The Particular Conditions must not change the balance of risk/reward allocation provided for in the General Conditions.

GP4: All time periods specified in the Contract for Contract Participants to perform their obligations must be of reasonable duration.

GP5: Unless there is a conflict with the governing law of the Contract, all formal disputes must be referred to a Dispute Avoidance/Adjudication Board (or a Dispute Adjudication Board, if applicable) for a provisionally binding decision as a condition precedent to arbitration (FIDIC, 2019).

As noted by I. Sukhostavets, after the publication of the FIDIC Golden Principles, the contractual principles of the standard forms of the FIDIC contracts became considered as untouchable. The Golden Principles are designed to limit the abuse of FIDIC contract terms and refer that using of the FIDIC General Conditions that do not comply with the Golden Principles would be interpreted as misrepresentation and irrelevance. At the same time, the scientist emphasizes that a violation of the FIDIC Golden Principles can result in a balance upset of the risks and cause losses, litigation, or termination of the contract (Sukhostavets, 2021).

Hereby, EPC-contract can be attributed to a special type of mixed contract, concluded in accordance with standard forms, developed by an international specialized organization, according to which the contractor is responsible for the engineering, supply, construction, and commissioning of the facility within the specified time and the employer is obliged to hand-over the site to the contractor in proper condition and to pay for the scope of work at a “fixed price” according to the approved payment schedule.

Also, the application of EPC contracts in the Post-Soviet Union States would be impossible without the establishment of fundamental legal principles in their legislation, such as the principle of freedom of contract and the principle of autonomy of will, which makes it possible to distinguish an EPC-contract from other mixed contracts and helps to make amendments by contractual structure and accessory obligations (parent company guarantee, bank guarantee, pledge, etc.), as additional guarantees which the parties provide to each other, or within the limits of those requirements that may be put forward by financial institutions (banks, credit-export agencies, etc.).

### **3.2. The main risks in conclusion and execution of EPC-contracts in the Post-Soviet Union States**

Legal researches of the construction industry development at the modern stage are becoming more and more connected with the availability of guarantees in contractual relations, which play an important role in risks minimization for its participants, which are interested in the successful implementation of the project because the number of problems and threats related to the activities of construction industry entities is gradually increasing.

The purpose of risk distribution is to find a balance between the interests of the contracting parties and the existing legal regulation of social relations. Of course, in the absence of qualified legal assistance, the possibility of placing the risk on a party that cannot bear it, due to legal regulations or established business practice, should not be excluded.

The full-scale invasion of the Russian Federation on the territory of Ukraine forced investors to reconsider the risk management system. This also applies to the construction industry, which has been greatly affected by war. Many construction projects based on the EPC model have been suspended, and some have been canceled. However, the nature of war, according to the experts and world leaders, will be protracted, which forces businesses to look for new ways and mechanisms not only to protect existing projects but also to potentially preserve the prospect of restoring projects in the future.

In practice, as a rule, the risk-sharing between the contracting parties can be regulated both during the signing of the contract and after it. The second option is possible due to the inclusion of two clauses in the wording of the agreement regarding:

- the application of the Principles of International Commercial Contracts, developed by the International Institute for the Unification of Private Law (hereinafter - UNIDROIT), as part of substantive law, according to which contractual relations are regulated;
- the settlement of disputes in international commercial arbitration.

As a legal definition of the exclusive nature of the above-mentioned clause, the UNIDROIT Principles of International Commercial Contracts introduced a neutral definition for all legal systems as “substantial injustice” (UNIDROIT, 2016), through the prism of which the courts should interpret the terms of the contract without detaching from its purpose.

UNIDROIT Principles of International Commercial Contracts belong to the so-called soft law, which in turn belongs to the “Lex mercatoria” group (extranational commercial law). The last edition of the mentioned principles was issued in 2016. This document was developed by authoritative experts in the field of international contract law and used by national courts and international commercial arbitrations as well.

Among the legal systems of the Romano-Germanic legal family, the prevalent approach is placing the risk on the party for which bearing risk is the least costly. As a rule, such a party can control risks due to effective management of its own operational and economic activities with minimal financial losses or by insurance or reinsurance of risks. This approach is based on the principle of economic feasibility. O. Volovyk represents a thesis that allocation of contractual risks between the parties should be made by using of mentioned principle exclusively. In turn, the application of the specified approach can be implemented with the help of dispositive and imperative methods of risk-sharing (Volovyk, 2013).

While analyzing the practice of concluding contracts according to FIDIC proforma in the Republic of Kazakhstan, Y. Yesimkhanov notes that the application of the FIDIC forms in Kazakhstan has a number of features and specifics that must be taken into account in order to make a positive effect on the application of such forms. Some of these specific features are associated with the peculiarities in the functioning of Kazakhstani legislation, others are connected with the fact that Kazakhstan has not yet developed the relevant practice and regulatory framework (Yesimkhanov, 2013). The scientist enumerates some practical issues of EPC application in Kazakhstan, but the given list of issues can be much wider.

The FIDIC forms contain a large number of references to the term's "acceptability", "rationality", and "reasonableness". In the analysis of such definitions, it's usually clear that the contractor must act "as a reasonable Contractor, taking into account the best interests of the Employer." Similarly, the ymployer must "demonstrate reasonable behavior" (Yesimkhanov, 2013). The presence of such norms can be explained by the set of business customs that have been developed around any standard form of contract.

And that's why the rules of "reasonable behavior", which in Kazakhstan look like a simple declaration, in most European countries have very specific content. Unlike European countries, the contract parties in Kazakhstan will put their own meanings into such norms, which will be definitely different from each other and from those explanations that the competent court will make.

However, Y. Yesimkhanov does not recommend unreasonably removing or amending such norms while application in Kazakhstan. The application of these rules depends on which court will consider the disputes under the contract. In the event, when EPC-contract has been executed between the employer and the contractor, which are registered in different states, the parties are likely to submit the relevant dispute for international arbitration. Also, it is recommended to settle the issue of approving design documentation while applying FIDIC forms in Kazakhstan. This will help to avoid such problems as, for example, incorrect estimation of the time frame required to complete the project by the contractor.

The main question related to the structure of the contract while applying the FIDIC forms in Kazakhstan is whether does it make sense to use a complex two-component contract structure? There are no reasons why such a structure cannot be applied in Kazakhstan. In order to simplify the contract, a lot of parties prefer to combine the General conditions and Particular conditions by transferring provisions of the second one to the first one and including them in the corresponding articles. However, in this case, parties should be careful and take into account the court which shall consider the dispute under the contract.

Unfortunately, it was not possible to find research that would be focused on practical aspects of risk control while executing of EPC-contracts in the Republic of Belarus. Instead, a lot of researches which are devoted to the study of this problem were made in the Russian Federation.

I. Suzdalev, a partner of the Ostlegal law firm, while researching ways to ensure the fulfillment of obligations under the EPC-projects, notes that according to current practice, the fulfillment of the contractor`s obligations is usually ensured by two guarantees:

1. advance payment refund guarantee;

## 2. performance bond.

The expiration of the period for which the guarantee was issued excludes the possibility of presenting claims according to it. In connection with this, the guarantee should provide the mechanism of its extension in case of its expiring, and the work (or the warranty period) is not completed. For this purpose, the clause regarding the extension of warranty period should be included in the EPC-contract and guarantee wording as well. In case, when such an extended guarantee is not granted, the employer is entitled to recover the entire amount of the previously granted (expiring) guarantee.

The legal status and the fate of the amount collected in this way are likely to be fixed in the EPC-contract. The amount of the retention money may be qualified as a penalty for the failure to provide an extended guarantee to the employer. At the same time, there is a significant risk that the amount of such a penalty will be significantly reduced by the court on the basis of article 333 of the Civil Code of the Russian Federation (Lypavskyi, 2019).

If we are talking about the risks that may occur while signing and implementing EPC-contracts in Ukraine, it is also impossible to provide an exhaustive list. However, we will still try to consider the most common situations where risks can be avoided or risk management opportunities can be foreseen.

Ukrainian employers, as a rule, prefer to control the construction process. Therefore, in most cases, the employer or the consulting engineer carries out a lot of checks, measurements, and other controls. Meanwhile, the imperative rule contained in article 853(1) of the CCU says: “The employer is obliged to accept the work performed by the contractor in accordance with the contract, inspect it and, in case of deviations from the terms of the contract or other deficiencies admitted in the work, immediately report the contractor about that. If the employer does not make such a statement, he loses the right to refer to these deviations from the terms of the contract or deficiencies in the work performed in the future.” (The Civil Code of Ukraine, 2003: article 853).

It should be emphasized that the specified rule of the CCU is fundamentally different from the existing international practice. For example, a lot of the FIDIC model contracts are based on the reverse principle: the approval of the performance of any work or the absence of comments by the employer in no case exempts the contractor from responsibility for committed violations.

Most of standard forms of contracts developed by FIDIC require the contractor to complete the work by a specified time, either by a specified date or within a specified number of days, weeks or months. Along with this, the contractor usually uses the provisions regarding limitation of liability and liquidated damages as a previously prepared legal protection.

According to the generally accepted approach, the concept of «liquidated damages» means damages whose amount the parties designate during the formation of a contract for the injured party to collect as compensation upon a specific breach (e.g., late performance).

The parties, as a rule, agree that the fixed amount of compensation cannot exceed the total value of the entire EPC-contract and calculates as a percentage for each day or week that has passed since such delay. At the same time, the Ukrainian legislation does not contain such a concept as «liquidated damages». Instead, there are provisions of article 216 of the CCU, which contains an indication that economic and legal responsibility is based on the principles according to which:

- the injured party has the right to compensation for damages regardless of whether there is a clause to this effect in the contract; the manufacturer's (seller's) liability for poor quality products provided by law also applies regardless of whether there is a clause to this effect in the contract;
- payment of fines for breach of obligation, as well as compensation for damages, do not release the offender without the consent of the other party from fulfilling the accepted obligations in kind;
- clauses regarding the exclusion or limitation of the liability of the manufacturer (seller) of products are unacceptable in the business contract.

Hereby, there are existing contradictions between the provisions related to compensation for damages under the EPC-contract and Ukrainian legislation. However, there is a way out of the situation, because when the party of the agreement is a non-resident company, it gives the opportunity to regulate contractual relations according to the norms of certain jurisdictions on their own. As a rule, this is the application of English law, which allows the parties to limit their liability under the contract. However, in this case, there should be a direct indication of this matter in the text of the EPC-contract itself.

### **Conclusions**

It can be concluded, that during the implementation of capital construction projects under EPC-contracts in the Post-Soviet Union States, contracting parties should take into account the occurrence of not only controlled risks: delay in receiving town planning documentation, untimely delivery of components and materials, inadequate quality of performed works, but attention should also be paid to the occurrence of uncontrollable risks, which often have a political nature, in particular: armed aggression, war, change of political regime, international sanctions, etc.



Right now, uncontrolled risks play a significant role in stifling the development of the construction industry in Ukraine. The Ukrainian Chamber of Commerce and Industry evidenced force majeure circumstances (force majeure): military aggression of the Russian Federation against Ukraine, which led to the imposition of martial law from 05:30 on February 24, 2022 (The Ukrainian Chamber of Commerce and Industry, 2022). This document made it possible to remove responsibility from the contractual parties for the non-fulfillment of the terms of EPC-contracts throughout the territory of Ukraine.

However, it is still too early to talk about a complete shutdown of the industry. In the controlled territories, the construction projects of renewable power plants, which, according to our data, are partially implemented according to the EPC concept by foreign contractors, continue the construction. The Tiligulska wind farm project currently located in the Mykolayiv region, on the territory of which active hostilities are taking place, can be an example of this. Such a conclusion can be made after analyzing the decision of the National Regulator, dated 06.14.2022 about increasing of the installed capacity of the wind power plant to 36 MW (NEURC, 2022).

A different situation occurred in the Republic of Belarus and the Russian Federation, where under the influence of sanctions pressure, construction projects based on the EPC concept are suspended or completely canceled. An example of such a project is the construction of the LNG-terminal «Arctic LNG 2», where Technip Energies refused to participate, following the Maire Tecnimont which also stopped participating in the implementation of EPC projects in Russia (Interfax, 2022).

Almost nothing is known about the suspension of EPC projects in Belarus, probably due to the presence of a high level of political censorship in the country.

Thus, the situation in Kazakhstan looks like the most stable and predictable, where EPC projects are not under such a high threat, and the political autocracy does not foresee a sharp change of power and guarantees political stability. Also, an indicator of this is the high interest among Kazakhstani scientists and a sufficient number of legal studies on the issues application of EPC-contracts according to FIDIC proforma, which were analyzed in this research.

Summarizing the above, we can conclude that proper legal adaptation of the FIDIC Silver Book to the legislation of the relevant Post-Soviet Union State is a necessary, but not sufficient condition for avoiding risks associated with the impossibility or improper execution of EPC-contracts. Lawyers should pay attention not only to the form of the main contract (Contractual Agreement does not contain basic conditions); permissions and consents; terminology while translating into the appropriate language



(works, employer, site); wording from English law (such as “acceptability”, “rationality”, “reasonableness”); arbitration clause; applicable language (agreement, documentation, correspondence); procedure for commissioning of the facility, but also on the possibility of insuring the occurrence of the so-called political risks.

This approach makes it possible to cover part of the losses (let’s be honest, insurance companies, as a rule, will not be able to compensate the entire amount of damage caused in large-scale projects), which were caused by armed aggression or the imposition of sanctions by third countries and makes implementation of project impossible (Jones Day, 2022).

Also, it should be emphasized that the above list is not exhaustive, and the adaptation process must take place on the condition of obtaining a license from FIDIC to make changes to the standard form of the contract in line with the copyright of the developers on its wording.

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