

14 THINGS TO KNOW IN CONSTRUCTION

Kazakhstan
Uzbekistan
Kyrgyzstan
Tajikistan

Turkmenistan
Georgia
Azerbaijan
Armenia



14 THINGS TO KNOW ABOUT CONSTRUCTION IN CENTRAL ASIA AND CAUCASUS

The construction industry in post soviet countries is significantly different from the construction industry of the West, and foreign contractors who enter the market for the first time must be prepared for a different environment.

1. Licensing requirements and permits

In most cases, construction works fall under licensable activity in all Central Asian countries, in Azerbaijan and in Armenia, to the exception of Georgia, where construction companies must obtain individual permits on each project, rather than licenses. Most of the licensing requirements include having sufficient experience in construction, having allocated technical and logistical capacities, and having a qualified professional in the team. In Kazakhstan, for example, regulators require up to 10 years' experience in similar projects, depending on the type of category.

Foreign companies generally cannot be licensed, with the exception of Kazakhstan, where licenses can be issued

in the name of foreign contractors. In all cases, foreign contractors must establish a local presence in some form.

A number of different types of approvals, consents and permits are required at each stage of design, construction works, transportation, installation and commissioning. In addition, obtaining permits is likely to cause delays during the project. Therefore, it is important that parties clearly agree on their responsibilities relating to the obtainment of permits. Generally, it should be noted that more approvals and permits must be obtained in our region for construction projects, particularly in comparison with Europe or the USA.

2. Design

Designing architectural and town planning documents is a licensing activity that cannot be performed by a foreign legal entity. As a matter of general practice, foreign design and engineering companies draft the design themselves, and then have it approved by one of the locally licensed design institutions.

Design consists of two major parts: ‘project documentation’ and ‘working documentation’. These are often translated as ‘basic design’ and ‘detailed design’, but the meaning of these terms is

different from in Europe or the United States. After having been developed by the contractor, the project documentation must be approved by the customer and then filed for the review of the state expert authority. Only when a positive expert review is granted may the customer apply for a construction permit. It is highly advisable that a foreign contractor entering the market for the first time liaises with local design institutions in order to gain a deeper understanding of the scope of design work and its requirements.

3. Public tenders

Compliance with specific tender procedures is the main requirement of public contract regulations. In all of the countries in our region (except Kazakhstan, where no public tender is required unless stated by law), construction projects funded by public capital,

state enterprises, non-budget funds of public organisations must go through public tenders. Privately financed projects are not required to follow specific rules, unless a contracting party decides so.

4. Financing schemes

Construction projects funded by state budget, special purpose funds and other public financing sources are subject to a mandatory financing scheme. This means that contractors are not generally free to agree on the financing mechanisms found in conventional EPC contracts. There is usually a maximum permitted payment of up to 15-20% of the contract amount and subsequent payments on each stage of

project completion. Also, there may be certain requirements relating to performance bonds and abort fees. Therefore, in most cases parties try to obtain a special governmental resolution that enables parties to freely negotiate payment terms. If the project is financed by private funds, then parties are free to choose their pricing mechanisms and payment conditions.

5. Local content

There are no special provisions regarding mandatory local sub-contracting. In Kazakhstan, however, subsoil projects, projects financed by the Samruk Kazyna (National Wealth Fund) or any other public funds are subject to local content requirements and minimum thresholds are determined on an ad hoc basis. In Azerbaijan, produc-

tion sharing contracts in oil&gas sector usually contain special provisions whereby preference should be given to local sub-contractors and local construction materials without prejudice to the quality or services and materials. These provisions, however, do not prohibit supply of materials and services from foreign sources.

6. Contracts

In general, there are no legal requirements as to the form of contracts. In Uzbekistan, however, law prescribes certain contract forms for construction projects financed by the state. Therefore, large infrastructure projects involving foreign investments and public funds generally need to be backed by governmental decree that usually grants benefits and exemptions from some regulatory requirements, including mandatory contract forms.

In brief, as a matter of practice 10-15 page contracts are usually used for small and medium-sized projects, while FIDIC forms are usually used for larger projects, especially if such projects are financed by ADB, IFC, EBRD, JBIC and other international financial institutions. While local laws do not forbid the use of FIDIC forms, it must be noted that such

contracts still need to be substantially revised in order to comply with local technical regulations, laws and secularities of the construction process. This is why, in practice, FIDIC contracts are usually 'custom-made' for each project in each of the countries in our region.

The issues of the choice of law and dispute resolution are well-known concepts in our region and are, in general, easily negotiated. It is common for a neutral governing law and international arbitration to be selected. It should be noted that parties cannot completely opt out of local technical and fiscal laws, with which they must comply. In our experience, the most popular places for construction dispute venues are Stockholm, London and Hong Kong, while Dubai and Singapore are also gaining popularity.

7. Limitation Period

As a general rule, the limitation period for filing a claim with local courts for disputes arising from contracts is three years. This applies to all countries, with the exception of Kazakhstan, where the limitation period for construction disputes is 10 years, unless otherwise agreed by the parties, but not less than two years.

The limitation period starts at the moment of final acceptance of the result of works, even if the contract provides for partial acceptances. However,

if a claim is raised during a warranty period stipulated in the construction contracts, then the limitation period shall start from the moment such a claim has been filed. It should be noted that once the limitation period has expired it may still be reinstated due to reasonable grounds. It must be noted though, that local courts require very serious grounds to reinstate the limitation period and therefore such reinstatements are quite rare.

8. Insurance

In all countries, with the exceptions of Georgia and Armenia, the procurement of third-party liability insurance is mandatory. In Azerbaijan such type of insurance is usually mandatory due to the terms of production sharing contracts in oil&gas sector. In Kazakhstan and Uzbekistan, the contractor must also purchase employee accident insurance and, for some type of hazardous projects, environmental insurance.

Non-admitted insurance is not allowed in our region and therefore all insurance policies must be purchased

from local insurance companies. In addition, it must be noted that not all insurance companies may be licensed to underwrite mandatory types of insurance and therefore license contents must be considered on an individual basis. Furthermore, the risks can be reinsured with foreign reinsurers, provided that some of the risk (usually no less than 5%) is retained by local insurers. It must also be noted that local insurance laws have certain qualification requirements for foreign reinsurances, such as minimum ratings of Standard&Poor and Moody's.

9. Indemnity

In our countries, the law does not recognise the mechanism of indemnities.

Indemnity clauses usually appear in contracts that are concluded with foreign contractors. However, if brought before the local courts, such clauses will either be viewed as void or construed as a reimbursement clause. Judicial practice has not yet been settled on this matter, and therefore decisions may vary between different courts.

Penalties can be in the form of liquidated damages and fines. Liquidated

damages are paid in the case of a delay in the fulfilment of obligations and are calculated on the basis of a percentage of the unfulfilled part of the obligations for each day of the delay. Fines are paid in the case of non-fulfilment or improper fulfilment of obligations and are usually set as a lump sum. Payment of penalties does not relieve parties from the fulfilment of any contractual obligations, including indemnity of possible damages, whether incurred or in the form of lost profits. If caused by negligence, the damages are unlikely to be fully covered by a negligent party.

10. Environmental protection

Environmental laws of the countries are quite strict and liability for violating such laws may include civil, administrative or even criminal liability, depending on the type of violation and the extent of the damage caused. Compliance with environmental and ecological laws must be considered throughout development and construction, starting with the design and land allocation. A design documentation, subject to the approval of the state construction regulator, must contain a separate section on environmental protection, including maximum allowed emissions, use of surface and subterranean waters, waste utili-

sation, etc. In most of cases, special ecological expertise from a licensed institution must be obtained.

The basic requirements for environmental protection include measures to ensure public health and safety, as well as the protection of the atmosphere, land, forests, water, flora, fauna and other parts of the environment, buildings, installations, reserves, and natural, historical and cultural monuments from the harmful effects of any associated works in accordance with the requirements of environmental legislation.

11. Taxation

A foreign contractor working in any of the countries in our region will almost certainly have tax consequences when working on EPC projects, which will most likely result in becoming permanently established for taxation purposes. However, there are certain cases when, according to double tax-

ation treaties or production sharing contracts in oil&gas sector, contractors are fully or partially exempt from local taxes. Therefore, it is particularly important to do tax planning and optimisation prior to contracting on the project.

12. Visa and Immigration Requirements

Generally, long visits of over one month require business visas, whereas for short stays tourist visas are sufficient. In Turkmenistan, however, the situation is very difficult and obtaining any type of visa requires significant support from either governmental institutions or a large foreign investor. Should expatriates need to travel for longer periods (anything over one year), special work permits can be re-

quired for both employees and (with the exception of Georgia and Armenia) for local entities. We would also advise you to check to see if there are any bilateral treaties in a country of operation that may grant extended stays for foreign employees. Breaches of immigration regulations may result in deportation and significant fines for the employee and employer.

13. Indemnity and liability

Courts in Central Asia, Azerbaijan, Georgia and Armenia are not likely to acknowledge mechanisms of indemnity. This is because laws in our region do not recognise the concept of indemnities. Although such provisions are quite common in FIDIC and other EPC contracts signed with foreign contractors, it is unlikely that these will be enforced by local courts, which will most likely construe them as reimbursement of damages. It should be noted that unlike in common law systems, it is quite difficult to obtain full reimbursement if the damage was caused by an act of negligence. In most cases courts will revise the damages and will reduce them as a result.

If an accident occurs, the liability will depend on the severity of the damage. If there are casualties then a criminal case will be opened, but in all other cases a special ad hoc committee will be organised to establish the cause of the catastrophe. Depending on the results of an investigation, the contractor, designer, supplier, and state inspection agency that confirmed due compliance with all construction standards, shall be held jointly or severally liable depending on their contribution and the remoteness of damage. There is no concept of criminal liability of legal entities in our legal systems. As such, if casualties do occur the general director, chief engineer and project manager are likely to be convicted.

14. Choice of Law and Forum

The choice of law and jurisdiction is an important factor in reducing political risks and consequent risks of non-payment. In general practice, there are no problems with choosing neutral law and disputes venues for construction contracts that are signed with foreign contractors. As a result, choosing English, Russian, Swiss or PRC law is absolutely possible, with the exception of issues relating to real estate and in cases when contracts are signed between two resident companies. It must be noted, however, that although parties are free to choose foreign law, this does not mean that they can entirely opt out of local fiscal and administrative requirements, such as licensing, taxation, public procurements rules, etc.

Likewise, parties are generally free to choose foreign forums for the resolution of disputes and in most cases parties choose international arbitration, to the exception of Georgia, where local courts have exclusive jurisdiction over construction disputes. The most popular venues for international arbitration are Stockholm, London, Dubai and Hong Kong. All of our countries, with the exception of Turkmenistan, are parties to the New York Convention 1958. It should be noted, however, that arbitrating and particularly enforcing arbitral award against state owned companies might prove extremely difficult. Yet again, we must note that disputes arising over title to real estate must be resolved in local courts.

Authors:

Colibri law firm - www.colibrilaw.com



Otabek Suleimanov
Partner
otabek.s@colibrilaw.com



Denis Bagrov
Partner
denis.b@colibrilaw.com

Ameria Law Firm (for Armenian part)
David Sargsyan and Lilit Aleksanyan
legal@ameria.am
www.ameriagroup.am

| | Armenia | Azerbaijan | Kazakhstan | Kyrgyzstan |
|------------------|--|---|---|--|
| Licensing | Some of the construction works are licensable. Minimum 3 years experience required for applicant. Foreign company can get license through a branch. | Some of the construction works are licensable. Minimum 5 years experience required for applicant. Foreign companies without a permanent establishment in Azerbaijan cannot get a license. Branch Offices of foreign companies duly registered in Azerbaijan are eligible to apply for a license. Consortiums are usually allowed. | Some of the construction works are licensable. Licensees are divided into 3 categories depending on different levels of responsibility. Qualification requirements vary depending on license category. Individuals and corporate entities can get license. Consortiums are usually allowed. | Some of the construction works are licensable. Foreign companies can get license through a branch. Consortiums are not allowed. |
| | Georgia | Tajikistan | Turkmenistan | Uzbekistan |
| | Construction works are subject to permits and not license. There are 3 types of permits: Construction Permit; Construction Permit of Special Importance; and Construction Permit of Nuclear and Radiation Objects. | Some of the construction works are licensable. Minimum 5 years experience required for applicant. Foreign companies can get license only through their representative offices and branches. Consortiums are not allowed. | Almost all types of construction works are licensable. Foreign companies are allowed get license, although opening branch is very complicated and time consuming process (up to three months). Law is silent on consortiums, but practically they do exist. | Some of the construction works are licensable. Minimum 5 years experience required for applicant. Foreign company cannot get license. Consortiums are usually allowed. |

| | Armenia | Azerbaijan | Kazakhstan | Kyrgyzstan |
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| Design | Design works must be agreed with the customer and approved by local agency of architectural and construction. | Design works are licensable. Design must be approved by customer and regulator. | Design works are licensable. Qualification requirements vary depending on license category. Design must be approved by customer and regulator. | Design works must be agreed with the customer and approved by local agency of architectural and construction. |
| | Georgia | Tajikistan | Turkmenistan | Uzbekistan |
| | Design works are not licensable activity, but each design must be approved by state regulator. | Design works are licensable. Design must be approved by customer and regulator. | Design of hazardous facilities is subject to licensing. Design must be approved by customer and regulator. | Design works are licensable. Design must be approved by customer and regulator. |

| | Armenia | Azerbaijan | Kazakhstan | Kyrgyzstan |
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| Public tenders | Only if construction works are funded by state budget or public funds. Exceptions apply. | Only if construction works are funded by state budget or public funds. Exceptions apply. | There is no requirement to hold public tenders, unless stated by law. So, contractors may be chosen by way of (1) closed or public tender; (2) tender with pre-selection of candidates; (3) without a tender. | Only if construction works are funded by state budget or public funds. Exceptions apply. |
| | Georgia | Tajikistan | Turkmenistan | Uzbekistan |
| | Only if construction works are funded by state budget or public funds. Exceptions apply. | Only if construction works are funded by state budget or public funds. Exceptions apply. | Only if construction works are funded by state budget or public funds. Exceptions apply. | Only if construction works are funded by state budget or public funds. Exceptions apply. |

| | Armenia | Azerbaijan | Kazakhstan | Kyrgyzstan |
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| Financing | When financed by public funds, parties must follow statutorily prescribed ways of payment under construction contracts. Exceptions apply. | When financed by public funds, parties must follow statutorily prescribed ways of payment under construction contracts. Exceptions apply. | When financed by public funds, parties must follow statutorily prescribed ways of payment under construction contracts. Exceptions apply. | When financed by public funds, parties must follow statutorily prescribed ways of payment under construction contracts. Exceptions apply. |
| | Georgia | Tajikistan | Turkmenistan | Uzbekistan |
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| | Armenia | Azerbaijan | Kazakhstan | Kyrgyzstan |
| Local content | No local content requirement. | Local content requirements may be found in PSA type contracts. This requirement is mostly takes form of a recommendation and does not prohibit foreign source supplies. | Subsoil projects, projects financed by the NWF Samruk Kazyna and subsidiaries as well as public procurement are subject to local content requirements. Minimum thresholds are determined by the formulas on a case by case basis. | No local content requirement. |
| | Georgia | Tajikistan | Turkmenistan | Uzbekistan |
| | No local content requirement. | No local content requirement. | No local content requirement. | No local content requirement. |

| | Armenia | Azerbaijan | Kazakhstan | Kyrgyzstan |
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| Insurance | No specific insurance requirements. | 3rd party liability insurance requirements are mostly required for sub-contractors working with PSA contractors. | Employee accident insurance is mandatory in KZ. Some construction works are subject to mandatory ecological or 3rd party liability insurance that must be procured locally. | Employers Liability Compulsory Insurance. 3rd party liability insurance is mandatory in case of exploitation of the dangerous objects. |
| | Georgia | Tajikistan | Turkmenistan | Uzbekistan |
| | No specific insurance requirements. However mandatory health insurance applies. | Contractor shall at his own expences insure the object of the construction and the construction works. | No specific insurance requirements. However worker's accident insurance applies. | 3rd party liability insurance is mandatory and must be procured locally. |

| | Armenia | Azerbaijan | Kazakhstan | Kyrgyzstan |
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| Limitation period | 3 years. | 3 years. | Generally, a warranty period equals to 10 years, unless otherwise specified by a contract, and not less than 2 years. | 3 years. |
| | Georgia | Tajikistan | Turkmenistan | Uzbekistan |
| | General limitation period is 3 years, but limitation period on contracts related to immovable property is 6 years. | 3 years. | 3 years in general and 6 years for real estate related disputes. | 3 years. |

| | Armenia | Azerbaijan | Kazakhstan | Kyrgyzstan |
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| Taxation | Foreign contractors will have to pay local taxes unless exempted under double taxation treaty. | Foreign contractors will have to pay local taxes unless exempted under double taxation treaty or production sharing contracts in oil&gas sector. | Foreign contractors will have to pay local taxes unless exempted under double taxation treaty or production sharing contracts in oil&gas sector. | Foreign contractors will have to pay local taxes unless exempted under double taxation treaty. |
| | Georgia | Tajikistan | Turkmenistan | Uzbekistan |
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| | Armenia | Azerbaijan | Kazakhstan | Kyrgyzstan |
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| Immigration | Foreign workers will have to obtain either business visa and local work permit to work on the project | Foreign workers will have to obtain residence permit and work permit to work on the project. The Employer shall obtain the permission to engage the foreign labor force. | Foreign workers will have to obtain either business visa or local work permit to work on the project. | Foreign workers will have to obtain either business visa and local work permit to work on the project. The Employer shall obtain the permission to engage the foreign labor force. |
| | Georgia | Tajikistan | Turkmenistan | Uzbekistan |
| | Foreign workers will have to obtain either business visa or local work permit to work on the project. | Foreign workers will have to obtain either business visa and local work permit to work on the project. The Employer shall obtain the permission to engage the foreign labor force. | Foreign workers will have to obtain either business visa or local work permit to work on the project. | Foreign workers will have to obtain either business visa except for CIS citizens or local work permit to work on the project. |

| | Armenia | Azerbaijan | Kazakhstan | Kyrgyzstan |
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| Foreign law | Genral principles of conflict of laws apply. Choice of foreign law and jurisdiction is allowed and usually not an issue. Regardless of choice of law, contractors must follow local technical standards and public law requirements. | Genral principles of conflict of laws apply. Choice of foreign law and jurisdiction is allowed and usually not an issue. Regardless of choice of law, contractors must follow local technical standards and public law requirements. | Choice of foreign law and jurisdiction is allowed and usually not an issue, except for public procurement, when only Kazakh law applies. Regardless of choice of law, contractors must follow local technical standards and public law requirements. | Genral principles of conflict of laws apply. Choice of foreign law and jurisdiction is allowed and usually not an issue. Regardless of choice of law, contractors must follow local technical standards and public law requirements. |
| | Georgia | Tajikistan | Turkmenistan | Uzbekistan |
| | Genral principles of conflict of laws apply. Choice of foreign law and jurisdiction is allowed and usually not an issue. Regardless of choice of law, contractors must follow local technical standards and public law requirements. Georgian courts have exclusive jurisdiction over the construction disputes in Georgia. | Genral principles of conflict of laws apply. Choice of foreign law and jurisdiction is allowed and usually not an issue. Regardless of choice of law, contractors must follow local technical standards and public law requirements. | Genral principles of conflict of laws apply. Choice of foreign law and jurisdiction is allowed and usually not an issue. Regardless of choice of law, contractors must follow local technical standards and public law requirements. | General principles of conflict of laws apply. Choice of foreign law and jurisdiction is allowed and usually not an issue. Regardless of choice of law, contractors must follow local technical standards and public law requirements. |

| | Armenia | Azerbaijan | Kazakhstan | Kyrgyzstan |
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| Declaration of UN Conference on the Human Environment (Stockholm Declaration) of 1972 | Not party. | Not party. | Not party. | Not party. |
| | Georgia | Tajikistan | Turkmenistan | Uzbekistan |
| | Applies in Georgia as other UN resolutions. Georgian environmental legislation contains direct references to Stockholm Declaration of 72. | Not party. | Not party. | Not party. |

| | Armenia | Azerbaijan | Kazakhstan | Kyrgyzstan |
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| Environment | Very strict. A design must contain a section devoted to environmental protection. Breach of environmental laws may lead to severe penalties, including criminal conviction. | Very strict. A design must contain a section devoted to environmental protection. Breach of environmental laws may lead to severe penalties, including criminal conviction. | Very strict. A design must contain a section devoted to environmental protection. Breach of environmental laws may lead to severe penalties, including criminal conviction. | Very strict. A design must contain a section devoted to environmental protection. Breach of environmental laws may lead to severe penalties, including criminal conviction. |
| | Georgia | Tajikistan | Turkmenistan | Uzbekistan |
| | There is an exhaustive list of activities which are subject of environmental impact assessment requirements. If the construction works are related to these activities, then EIA should be done. | Very strict. A design must contain a section devoted to environmental protection. Breach of environmental laws may lead to severe penalties, including criminal conviction. | Very strict. A design must contain a section devoted to environmental protection. Breach of environmental laws may lead to severe penalties, including criminal conviction. | Very strict. A design must contain a section devoted to environmental protection. Breach of environmental laws may lead to severe penalties, including criminal conviction. |

| | Armenia | Azerbaijan | Kazakhstan | Kyrgyzstan |
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| Contractual matrix | Most major projects are implemented on an EPC or EP-C(M) basis, when a general contractor is employed by the customer and subcontractors are employed by the general contractor on its own behalf. | Most major projects are implemented on an EPC or EP-C(M) basis, when a general contractor is employed by the customer and subcontractors are employed by the general contractor on its own behalf. | Most major projects are implemented on an EPC or EP-C(M) basis, when a general contractor is employed by the customer and subcontractors are employed by the general contractor on its own behalf. | Most major projects are implemented on an EPC or EP-C(M) basis, when a general contractor is employed by the customer and subcontractors are employed by the general contractor on its own behalf. |
| | Georgia | Tajikistan | Turkmenistan | Uzbekistan |
| | Most major projects are implemented on an EPC or EP-C(M) basis, when a general contractor is employed by the customer and subcontractors are employed by the general contractor on its own behalf. | Most major projects are implemented on an EPC or EP-C(M) basis, when a general contractor is employed by the customer and subcontractors are employed by the general contractor on its own behalf. | Most major projects are implemented on an EPC or EP-C(M) basis, when a general contractor is employed by the customer and subcontractors are employed by the general contractor on its own behalf. | Most major projects are implemented on an EPC or EP-C(M) basis, when a general contractor is employed by the customer and subcontractors are employed by the general contractor on its own behalf. |