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FIDIC-SIDiR-EFCA Regional Infrastructure Conference

**Krakow
7 & 8 March 2016**

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Golden Principles and Public Law



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Golden Principles and Public Law

Strict rules or Guiding lines?

What about:

- EU Procurement Directives?
- National public law?



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Golden principles regard:

- Clear and logical structure of contract
- Clear and balanced rights, obligations and risk allocation
- Engineer
- Flexibility - variations
- Multi-tiered mechanism dispute resolution
- Are there others?




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- **Principles of the public law / EU procurement regime principles:**
- Principles of the Treaty on the Functioning of the European Union (TFEU) to comply with:
 - free movement of goods,
 - freedom of establishment and
 - freedom to provide services
- Principles deriving there from:
 - equal treatment
 - non-discrimination
 - mutual recognition
 - proportionality
 - transparency
- Most efficient use of public funds
- Taking responsibility



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Limits and changes in public domain

- Objective
- Subjective



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Objective – imperative public law

- Procurement (EU / national) law
- Budget & Fiscal law
- Criminal law
- Construction law
- Municipal law
- Other (many others...)



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Clear and logical structure of contract

- There are no legal restrictions against logic and clarity
- European Commission:
“standardised documents, especially in the field of construction, contribute to facilitating the procurement process” (DG REGIO Public Procurement Stock-Taking Study)



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Clear and balanced rights, obligations and risk allocation

Motivation of using FIDIC Form of Contracts

Efficiency based criteria:

- which party is able to control the risk
- which party can sustain the consequences better
- what right / obligation cannot be transferred

Risks should be reflected in the financial proposals

- lowest price vs. M.E.A.T.



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Flexibility - variations

- The right to vary can be maintained provided that it observes the EU and national imperative limits and conditions for the modification of the Contract.
- There shall be a different approach for the substantial variation and the minor variation.
- Irrespectively, the variation should fulfill the conditions of eligibility

Substantial modification

A modification of a contract or a framework agreement during its term shall be considered to be substantial where it renders the contract or the framework agreement materially different in character from the one initially concluded [DG MARKT Letter ARES (2012)]



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Directive 2014 / 24 / EU

Article 72 – expressly provides the cases and the condition for each of them in which the contracts and framework agreements may be modified without a new procurement procedure

National / Local law

Can provide more strict conditions.

Modification by the decision of the Court (of law or arbitration)



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Engineer

- Even in the absence of the EU provisions, in public contracts usually there are stated:
 - limitations of the duties and/or authority of the Engineer,
 - request of a prior and written consent of the Employer for any action of the Engineer
 - removal of the presumption of the existence of such a consent
- Replacement of the Engineer
- Engineer's Instruction and Determination



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Claim

- Legal nature of 28 days notice term
- Legal nature of the Engineer's Determination
- Enforceability of the Engineer's Determination



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Multi-tiered dispute resolution mechanism – DAB

- Legal nature of the DAB
- DAB members selection
- DAB members payment & eligibility of their fees and costs
- Enforceability of the DAB decision
- Preliminary legal procedures



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Multi-tiered dispute resolution mechanism - Amicable Settlement

- Possibility to conclude such an agreement
- Need of a special mandate from higher authority for the contracting authority (Employer)
- Need for the higher authority to approve the amicable settlement concluded by the Employer
- Legal capacity / procedure



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Multi-tiered dispute resolution mechanism – Arbitration

- Admissibility of the procedure
- Enforceability of an interim award
- Enforceability of the award



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Subjective – “human condition”

- Indifference
- Fear
- Ignorance
- Corruption
- Other?



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Objective – subjective limitations of the freedom of contracts

- Budgetary constraints
- Restrictive law provisions
- Interpretation of the audit bodies
- Court decision



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P.S. - Don't forget the control and audit missions!

Such verifications may take place within a period of up to 7 years after the settlement of the Final Payment Certificate



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