

FIDIC Golden Principles from the Employer Perspective in Non-Common Law Jurisdictions

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FIDIC golden principles have been developed to represent an anchor that would not allow FIDIC users to deviate from the key principles incorporated into the FIDIC forms of contract. This article summarizes what will or will not represent violation of the FIDIC golden principles and how certain potential deviations can be viewed from the employer's perspective.

FIDIC is the international federation of national member associations of **consulting engineers** that was founded in 1913 with the objective of **promoting the professional interests of member associations**.

One of the major directions of FIDIC's work that represent its biggest contribution into development and enhancement of the regulatory environment in construction worldwide are the FIDIC forms of contract, which are becoming increasingly popular among the engineering and construction community throughout the world, including Europe, CIS, the Middle East, Africa, and China. This is mainly because FIDIC forms of contract are claimed to be based on a fair and well-balanced risk/reward allocation between the employer and the contractor—the risk should be borne by the party that is in the best position to manage it at the least cost.

In order to safeguard such balanced risk/reward allocation, FIDIC has elaborated its so-called "golden principles," i.e., guidance for users as to which contractual provisions must not be amended so as not to jeopardize or destroy the intended balance of risks between the parties to a contract.

Users of FIDIC forms of contract are well aware that these forms are based on English/common law concepts. Therefore, FIDIC recognizes that its forms of contract may need to be supplemented to reflect the peculiarities of the governing law of a contract and/or the law of the jurisdiction where the site is located. Some common law concepts provided for under the FIDIC forms of contract, such as indemnity, do not exist under Kazakhstan law. Thus, the enforceability of such provisions becomes questionable, and the revisions that need to be made in order to address this issue are generally recognized as acceptable by FIDIC.

Along with such supplements, FIDIC also agrees that some changes may need to be made in order to address the specifics of a project or a site, or certain **reasonable** preferences of an employer. Obviously, any unreasonable preferences of either party would affect a proper balance of risks and rewards and would lead to either failure by the parties to reach an agreement (in the best case) or failure of the project as a whole (in the worst case).

While it is difficult to determine what would represent reasonable preferences of the employer in every case, in 2019 [FIDIC created its guide on the golden principles](#), giving examples of what is and what is not compliant with these principles, and the rationale behind each one.

We will go through the golden principles from the perspective of the employer. While some of these principles are self-explanatory and do not raise any major concerns on the employer's side, the others, in the opinion of the authors, require more scrutiny and consideration from the employer's perspective.

Golden principle 1:	The duties, rights, obligations, roles, and responsibilities of the contract participants must generally be as implied in the General Conditions and appropriate to the requirements of the project.
Golden principle 2:	The Particular Conditions must be drafted clearly and unambiguously. <i>The principle is self-explanatory, but can still be underestimated, especially by non-legal experts. Particular attention must be paid to cross-references, and lawyers experienced in dealing with FIDIC contracts would usually use proper legal writing.</i>
Golden principle 3:	The Particular Conditions must not change the balance of the risk/reward allocation provided for in the General Conditions. <i>This principle resonates in many ways with golden principle 1 and needs to be considered in conjunction with that principle.</i>
Golden principle 4:	All periods specified in the contract for the participants to perform their obligations must be of reasonable duration. <i>FIDIC is willing to provide some flexibility built into this principle because timelines will depend heavily on the specifics of the project, jurisdiction where the project is implemented, etc.</i>
Golden principle 5:	Unless there is a conflict with the governing law of the contract, all formal disputes must be referred to a dispute adjudication board (DAB) or dispute avoidance and adjudication board (DAAB) for a provisionally binding decision as a condition precedent to arbitration.

As stated above, golden principles 2 and 4 are self-explanatory, while principles 1, 3, and 5 would benefit from further focus.

Employer’s expectations/preferences. Compliance with principles 1 and 3 requires a good knowledge of available FIDIC contract forms and differences in risk/reward allocation among them, as well as when it is appropriate to use one form and not the other. Thus, when complying with principles 1 and 3, a correct choice of form of contract is crucial.

In making this choice, the employer’s preferences are often underestimated or inadequately addressed. Therefore, even if on its face the choice of contract looks appropriate, when it comes to the development of the Particular Conditions, the Particular Conditions amend the relevant General Conditions so dramatically that the form of contract may no longer be appropriate.

It is important to understand what the employer’s expectations are before making a final choice of contract form. For example, public or quasi-public employers will usually look for the fixed budget and timeline, and will be willing to transfer a majority of the risks to a contractor, even if there is some work being done by the employer or the employer’s other contractors. Therefore, instead of using, e.g., the Yellow Book, it may be more appropriate to take the

lead from the employer's expectations (rather than the conditions existing at the moment of a tender offer or entry into a contract) and choose the Silver Book.

Creditor-related issues. Leading international financial institutions, such as the World Bank and EBRD, support the use of FIDIC forms of contract because they share the approach and concepts communicated by FIDIC.

Obviously, all parties involved would only benefit from a well-balanced contract that is intended to secure overall project success. Such a contract will (with a high degree of certainty) be more economically attractive. Thus, no excessive money will be spent.

However, as a matter of practice, financing puts a lot of pressure on an employer acting as a borrower—the employer would usually accept several undertakings toward its creditor, many of which are disadvantageous and burdensome to the employer.

Now imagine when an employer's undertakings toward its creditor cannot be shifted (when ideally they should be) onto a contractor because the creditor would not approve a contract that is less balanced than, in the creditor's opinion, it should be. So, on one hand, the creditor wants to secure its risks, and, on the other hand, it wants to see a well-balanced project contract. Ultimately, the employer ends up in a "sandwich" situation in which it is exposed to a significant risk of liability for the contractor's failure to accept undertakings toward the creditor and vice versa.

One example of this can be when payment is delayed by an employer due to the creditor's extensive review timeline of the employer's disbursement application. The employer will have to pay penalties, plus the contractor will have the right to suspend the working arrangement and, in extreme cases, to terminate the contract. Such a situation will likely jeopardize the future of the project and, therefore, neither the creditor nor any of the parties to the contract will benefit from the contract.

Engineer. There is a great amount of discretion and authority put into the hands of an engineer under FIDIC contracts that provide for this role. The employer can oftentimes be inexperienced in design and construction and will, therefore, hardly rely on the engineer. Therefore, the level of the employer's trust toward the engineer becomes very important.

In practice, unfortunately, not all engineers follow best business practices. By way of example, a company acting as engineer and with strong experts on its team could bid and demonstrate this strong expertise at the time of a tender offer, but once the contract is awarded the company could send onsite junior specialists who need to be trained.

From the employer's perspective, this is solved via either making the employer approve certain decisions of the engineer or entitling the employer to veto some of the engineer's decisions. FIDIC sees these tools as a violation of golden principles 1 and 3. FIDIC suggests that in case of an employer's disagreement with an engineer's decision, the employer can refer to DAB/DAAB or arbitration. In practical terms this can hardly be a solution, knowing that such reference is not necessarily efficient in terms of time, cost, and further enforcement of the decision(s) made.

DAB/DAAB. The major concern of the parties to a contract relating to the reference of disputes to DAB/DAAB has been the enforcement of DAB/DAAB decisions. DAB/DAAB can serve as an efficient tool for the purposes of preventing disputes or disagreements and their fast resolutions. However, a decision of DAB/DAAB is only provisionally binding. Thus, the

execution of such a decision will depend on the good faith and reliability of the parties to the contract.

Because of the enforceability issue, in many cases, even after the parties refer the dispute to DAB/DAAB and receive its decision, they still end up in arbitration (or court).

We have yet to see whether relatively recent changes to the provisions of FIDIC contracts on DAAB will work better, and if the users of FIDIC forms of contract will rely more on DAAB.

Conclusion. Obviously, FIDIC has done enormous work in preparing and enhancing its forms of contract due to changing market needs worldwide. However, as mentioned previously, FIDIC's primary objective has been to promote the interests of Member Associations of consulting engineers. Currently, most participants in discussions concerning FIDIC forms of contract are engineering and contractor companies (along with the legal community). Apparently, employers are not actively involved in the dialogue.

We believe that in order to further improve FIDIC forms of contract and enhance the environment for successful implementation of construction projects, it is critical to establish a strong connection with an employer's community on the basis of the FIDIC platform, which is probably one of the most influential associations in the engineering and construction area. This will help all parties to a contract exchange their knowledge, expertise, and expectations, and to find upfront solutions that may slightly change the views as to what is or is not compliant with the FIDIC golden principles.