



FIDIC

International Contract Users' Conference 2010

*The Contractor's View on the
"FIDIC 2010 MDB Harmonised Construction Contract"*

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Director of European International Contractors e.V.

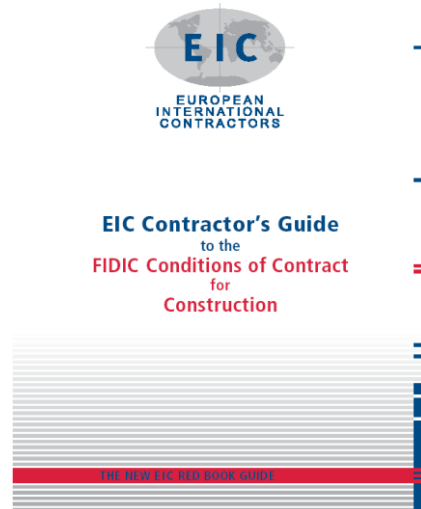
The EIC Contractor's Guides

EIC Contractor's Guides on the FIDIC „New Books“ were produced between 2000 and 2003 and the EIC Guide on the DBO Contract in 2009.

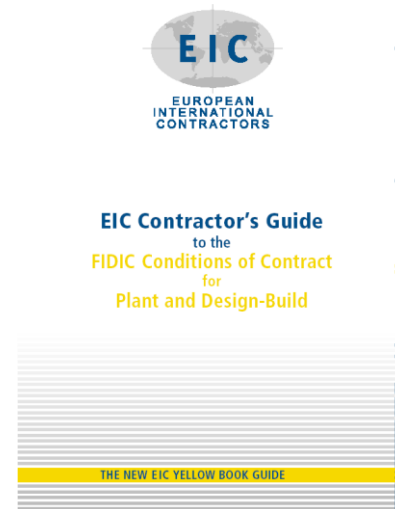
They all have been published in the *International Construction Law Review*.



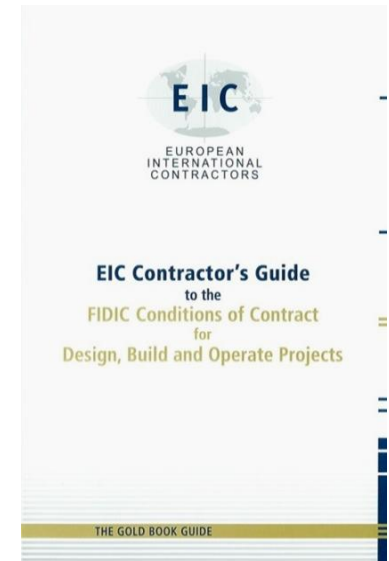
March 2000



March 2002



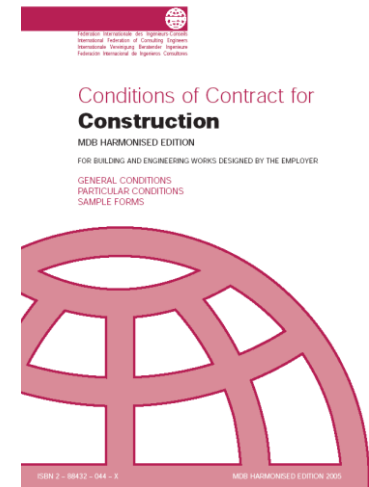
March 2003



May 2009

Genesis of the FIDIC 2010 MDB Harmonised Contract

- ✦ **FIDIC MDB Harmonised Construction Contract (May 2005)**
- ✦ **FIDIC MDB Harmonised Construction Contract (March 2006)**
- ✦ **FIDIC Harmonised Construction Contract (June 2010)**
- ✦ **World Bank General Contract Conditions (August 2010)**
- ✦ **ATTENTION: ALL DOCUMENTS ARE DEVIATING ON DETAILS !!!**



EIC criticism towards FIDIC 2010 MDB Harmonised Contract

☀ From the beginning, the MDB Harmonised Construction Contract has introduced some **problematic concepts** with regard to:

■ **Role of the Engineer**

- Employer has now an **unilateral right to change authority of** and to **replace** the Engineer

■ **Performance Security**

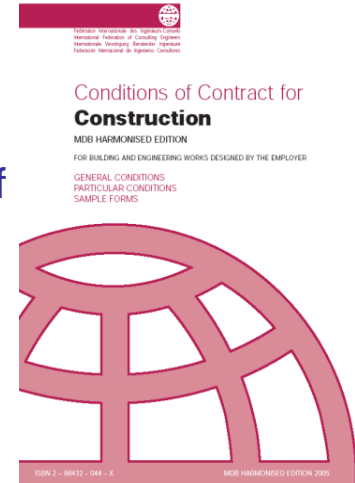
- Employer has now a **discretionary right to make a claim**

■ **Corrupt and Fraudulent Practices**

- Employer has now an **unilateral right to terminate the Contract**

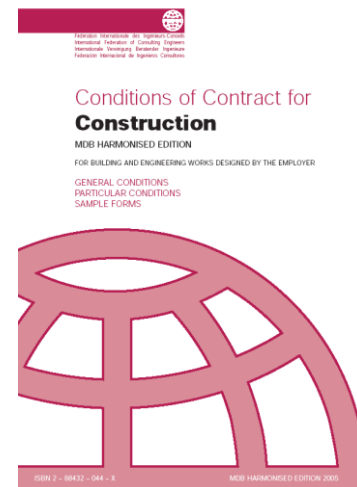
■ **International Arbitration**

- The arbitration clause distinguishes between **“foreign contractors”** (international arbitration applies) and **“domestic contractors”** (laws of the Employer’s country apply)



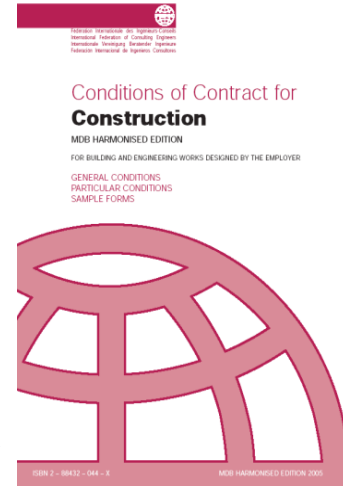
New provisions / titles in the FIDIC MDB Edition

- ✦ **Sub-Clause 1.15** [*Inspections and Audit by the Bank*]
- ✦ **Sub-Clauses 6.12 – 6.24** [*Social Clauses*]
- ✦ **Sub-Clause 15.6** [*Corrupt or Fraudulent Practices*]
- ✦ **Sub-Clause 17.7** [*Use of Employer's Accommodation / Facilities*]
- ✦ **Sub-Clause 15.5** [*Employer's Entitlement to Termination **for Convenience***]
- ✦ **Sub-Clause 19.7** [*Release from Performance **under Law***]
- ✦ **Sub-Clauses 20.2 et sqq.** [*Appointment of the Dispute **Adjudication** Board*]



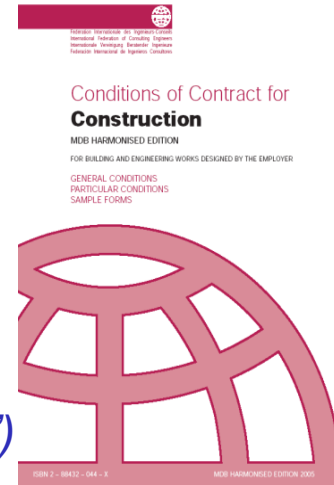
Improvements on FIDIC 1999 Editions

- ✦ The MDB Harmonised Construction Contract **accommodates some comments of the EIC Contractor's Guides**, such as
 - ◆ ***Rate of profit*** is pegged at **5% of the Cost**
 - ◆ **Both parties** are required to keep the ***contract details confidential***
 - ◆ Obtaining ***building permit*** is responsibility of the ***Employer***
 - ◆ ***28-days notification period*** applies also to ***Employer's Claims***
 - ◆ ***Time limit for Engineer's determination*** is ***28 days***
 - ◆ Employer shall provide the necessary ***special or temporary rights-of-way***
 - ◆ Introduction of ***„pay-when-paid“ clause*** regarding Nominated Subcontractor



Improvements on FIDIC 1999 Editions

- ★ The MDB Harmonised Construction Contract **accommodates some comments of the EIC Contractor's Guides**, such as
 - ◆ *Ownership of Plant & Material* has been revised
 - ◆ *Commencement* of the Works only upon fulfilment of ***certain conditions precedent***
 - ◆ Additional right to ***refuse a Variation*** (“*economic imbalance*”)
 - ◆ ***Repayment deduction*** does not commence until **30%** of the Accepted Contract Amount less Provisional Sums has been certified
 - ◆ DAB can be activated if the **Engineer fails to respond within deadline**

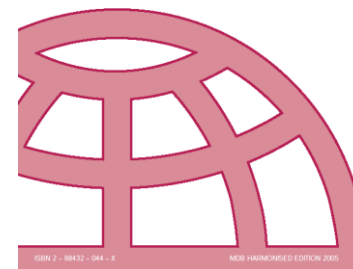


Differences between FIDIC 2010 and the World Bank 2010

- ✦ **Sub-Clause 1.1.6.10 [Notice of Dissatisfaction]**
This definition is only to be found in FIDIC-MDB, not in WB-GCC
- ✦ **Sub-Clause 1.12 [Confidential Details]**
WB-GCC applies only to “Contractor’s” compliance,
FIDIC-MDB obligation also refers to the Employer’s compliance
- ✦ **Sub-Clause 1.15 [Inspections and Audit by the Bank]**
WB-GCC adds 2nd sentence with reference to Sub-Clause 15.6
- ✦ **Sub-Clauses 4.2 [Performance Security], 14.2 [Advance Payment] and 14.9 [Payment of Retention Money]**
FIDIC allows Contractor to select financial institution provided it is “reputable”, whereas WB-GCC insists on “an entity and from within a country... approved by the Employer”
- ✦ **Sub-Clause 4.13 [Right of Way and Facilities]**
FIDIC asks Employer to provide “effective” access to and possession of the Site



Conditions of Contract for
Construction
MDB HARMONISED EDITION
FOR BUILDING AND ENGINEERING WORKS DESIGNED BY THE EMPLOYER
GENERAL CONDITIONS
PARTICULAR CONDITIONS
SAMPLE FORMS



Differences between FIDIC 2010 and the World Bank 2010

- ✦ **Sub-Clauses 6.20 [Forced Labour] and 6.21 [Child Labour]**
WB-GCC definitions refer to “Forced or Compulsory Labour” and to “Harmful Child Labour”, FIDIC-MDB adds 2nd sentence in SC 6.21
- ✦ **Sub-Clause 8.1 [Commencement of Works]**
FIDIC-MDB asks Employer to provide “effective access to” the Site
- ✦ **Sub-Clause 15.6 [Corrupt or Fraudulent Practices]**
FIDIC-MDB requires that Employer’s determination is based on “reasonable evidence”, WB-GCC refers to Contractor and/or also “any of its personnel, agents, Subcontractors, subconsultants, services providers, suppliers and/or employees”
- ✦ **Sub-Clause 20.5 [Amicable Settlement]**
FIDIC-MDB provides that “the Party giving a Notice of Dissatisfaction... should move to commence arbitration”
- ✦ **Sub-Clause 20.6 [Arbitration]**
FIDIC-MDB refers to ICC Rules as the 3rd and last option, WB-GCC only refers to Contract Data as 1st option and UNCITRAL Rules as 2nd option

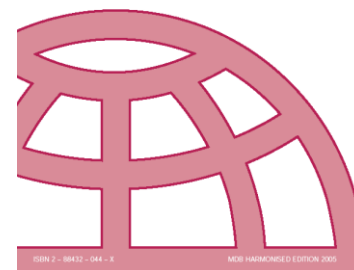


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Conclusion: A positive outlook

- ✦ Regrettably, the alterations in Sub-Clauses 3.1, 3.4, 4.2, 15.6 and 20.6 represent an **opportunity for abusive behaviour** towards the Contractor and potentially **adulterate the fundamental balance of the contract**
- ✦ **BUT:** EIC acknowledges the various technical improvements introduced by FIDIC which are contributing to making the FIDIC 2010 MDB Harmonised Contract Edition a **more balanced contract**
- ✦ Regrettably, after five years of consultations between FIDIC and the World Bank it has **still not been possible to agree on a unified wording**
- ✦ **BUT:** EIC will collaborate with FIDIC in order to make this contract a **truly “harmonised” FIDIC MDB Edition** which is also used by the European Commission and several bilateral donor agencies

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