

# Construction Contracts: A Comparison Between the FIDIC Red Book and the 2010 MDB Conditions

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In light of such diversity, parties may have different expectations regarding the effect of their substantive rights under the contract, or the process and treatment of disputes, when these arise.

With respect to standardised construction contracts (which help to conform divergent expectations), perhaps none are better known than the suite of contracts published by the Fédération Internationale des Ingénieurs-Conseils (“FIDIC ”), which are commonly used throughout the Middle East.

Among other things, the different forms of FIDIC Contracts reflect different procurement approaches (particularly regarding design responsibility). For instance, while the “FIDIC Red Book” is scoped around works predominantly designed by the Employer, the “FIDIC Yellow Book” is used for works primarily designed by the Contractor. Additionally, the “FIDIC Silver Book” is intended for use on turnkey projects while the “FIDIC Gold Book” is appropriate for ‘Design-Built-Operate’ projects.

Construction projects undertaken by Multilateral Development Banks (such as the World Bank, Asian DB etc.) are frequently procured under FIDIC Contracts. However, the Multilateral Development Bank recently published the “Multilateral Development Bank Harmonised Edition” (MDB Conditions), which contains some important departures from the FIDIC forms. This article identifies some important differences between the [FIDIC Red Book \(1999 Edition\)](#) (FIDIC Conditions), and the MDB Conditions.

## 1. Sub-clause 2.5 [Employer ’s claims]

The FIDIC Conditions provide, at sub-clause 2.5, that if an Employer considers himself entitled to any payment from the Contractor, a notice “shall be given as soon as practicable after the Employer became aware of the event or circumstances giving rise to the claim”. The MDB conditions however state that such notice shall be given “no longer than 28 days after the Employer became aware or should have become aware”, thus mirroring the timeframe within which the Contractor has to provide notice of its own claims under the its own claims under the Contract. This also means that, unlike the FIDIC conditions, the Employer under the MDB Conditions must comply with a 28 day deadline, otherwise the claim may be time barred.

## 2. Sub-Clause 3.1 [Engineer’s Duties and Authority] and sub-clause 3.4 [Replacement of the Engineer]

Under sub-clause 3.1 of the FIDIC Conditions, the Employer “undertakes not to impose any further constraints on the Engineer’s authority, except as agreed with the Contractor”. To the detriment of the Contractor however, the MDB Conditions change this stance, as they allow the Employer to unilaterally change the authority of the Engineer with only an obligation to notify the Contractor of such a change. This may result in the Engineer assuming a more significant role under the Contract, which is important because the Engineer is “deemed to act for the Employer”.

An additional important difference to clause 3.1 in the MDB Conditions is that the Engineer needs to obtain

“specific approval” of the Employer before agreeing an extension of time or additional cost or instructing a variation.

Finally, under clause 4.1 of the MDB Conditions the Employer is only required to give “full and fair consideration” to any objections raised by the Contractor regarding the replacement of the Engineer. However, the FIDIC Conditions provide that the Engineer shall not be replaced if the Contractor “raises reasonable objection by notice”.

### 3. Sub-Clause 3.5 [Determinations]

Sub-clause 3.5 of the FIDIC Conditions provides that when the Engineer proceeds to agree or determine any matter, he should consult with the parties and make a fair determination if he cannot reach agreement with them.

The MDB Conditions however introduce a 28 day time limit from receipt of the request for the Engineer to make such a determination. The intent behind the amendment is clearly to encourage the Engineer to make prompt determinations, which is in the interest of all parties.

### 4. Sub-clause 4.2 [Performance Security]

The MDB Conditions amend this sub-clause to allow for the Performance Security to be denominated in a freely convertible currency acceptable to the Employer, rather than restricting the same to the currency of the contract.

Whilst this does grant more flexibility to both parties, it may be a potential trap for the Contractor. This is because the sub-clause is silent with regard to the effect of currency fluctuation on the performance security. For instance, a currency devaluation may render the value of the performance security less than what is required under the Contract. This in turn may be considered a breach of sub-clause 4.2, potentially justifying termination by the Employer, as provided for under sub-clause 15.2. Consequently extra vigilance must be exercised with regard to the provision relating to performance security. In order to mitigate this risk, the exchange rate should be agreed upon in the contract.

The MDB Conditions also forgo the requirement that the entity issuing the performance security must be approved by the Employer, replacing this with the requirement that said security be issued by a “reputable bank or institution”, which may be “selected by the Contractor”.

Another notable change relates to the conditions under which the Employer can claim the Performance Security. In the FIDIC Conditions there must be breaches of contract which entitle the Employer to make a claim under the Performance Security as stated in the FIDIC Conditions (which including affording the Contractor 42 days in which to remedy any breach). However sub-clause 4.2 has been amended in the MDB Conditions so as to refer to claims for amounts to which the Employer is entitled under the Contract, irrespective of any breach. This is clearly advantageous for the Employer.

### 5. Sub-Clause 16.2 [Termination by the Contractor]

The grounds upon which the Contractor can terminate have been broadened and clarified under the MDB Conditions. In respect of sub-clause 16.2(d), additional wording has been added to clarify that any “substantial failure to perform” by the Contractor must “materially and adversely affect the economic balance of the Contract and/or the ability of the Contractor to perform the Contract” in order for a right of termination to arise. Additionally, the Contractor now has a right to terminate if the Contractor does not receive the Engineer’s instruction regarding the agreed commencement date.

### 6. Sub-Clause 17.6 [Limitation of Liability]

Important exclusions to the prohibition against recovery of “loss of profit, loss of any contract or any

indirect or consequential loss or damage” have been inserted in the MDB Conditions. These exclusions apply to delay damages, the cost of remedying defects, payments upon termination, indemnities, the consequences of Employer’s Risks and liability resulting from a breach of intellectual property rights.

#### 7. Sub-clause 20.1 [Contractor’s Claims]

The MDB conditions, as opposed to the FIDIC Conditions, expressly clarify that “If the Engineer does not respond within the timeframe defined in this Clause [20.1], either party may consider that the claim is rejected by the Engineer and any of the Parties may refer the matter to the Dispute Board in accordance with Sub-clause 20.4 [Obtaining Dispute Board’s Decision]”. This amendment may prove useful where the dispute relates to a time sensitive matter, and as such is an amendment that benefits both Contractor and Employer.

#### 8. Sub-clause 20.2 [Appointment of the Dispute Board]

A further change made by the MDB Conditions is the introduction of the Dispute Board (“DB”), replacing the Dispute Adjudication Board (“DAB”). Pursuant to Sub-clause 20, DB decisions are immediately binding on both parties, who shall promptly give effect to it unless and until it shall be revised in an amicable settlement or an arbitral award, and in that regard is equivalent to the DAB. The DB is available throughout the duration of the contract, which if tactfully utilized may be a useful and time efficient manner through which to resolve disputes and minimize any delays to the progress of the works. The MDB Conditions further introduce the requirements of the members to be not only fluent in the language of communications defined in the Contract, but require the members of the DB to be professionals experienced in the type of construction involved in the contract works, in addition to experienced in the interpretation of contractual documents.

### **Concluding Remarks**

Standardized contracts provide a contractual framework within which the parties’ potentially confrontational relationship can survive the execution of the contract to attain a common end. In reality, the execution of these provisions may often be impeded with ambiguities and potential traps, a situation amplified by the disregard parties sometimes have of the details found within them. The amendments noted above are only some of the changes made by in the MDB Conditions, many of which rebalance the obligations of the parties to the contract, sometimes in subtle ways.

In our experience, it is frequently the case that a potential party to a construction contract fails to properly assess the risks inherent in the contract that has been produced and in particular, scrutinize the contract for amendments to the standard form that might work against them. It is essential that there be a review by legal counsel of the conditions of contract before a party agrees to sign the agreement, and an appropriate sum should be budgeted for this purpose at the outset of any potential contract discussions.