



## A Germans fit for FIDIC?

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The FIDIC standard forms, the so called Red Book, Silver Book, Yellow Book and Green Book, sometimes seem to be a mystic thing for German engineers, who failed to participate in international construction projects for quite a while. German contractors on the other hand have always been fit for FIDIC contract terms. For the future there are several reasons why the interest of German engineers in the FIDIC standards forms is likely to increase:

The FIDIC forms are intended to be suitable for many projects being carried out around the world by all types of employers, often in a civil law environment, where the government departments or private developers wish to implement their project on a fixed-price turnkey basis and with a strictly two party approach. The new market in East Europe (Poland, Russia, Ukraina etc.) is constantly growing and essentially covered by FIDIC standard forms. EBRD and World Bank are investing more and more monies in these countries. Finally, a new generation of architects and engineers has grown up in Germany.

The first impression that German engineers, contractors and lawyers have when giving a quick glance to the FIDIC Standard forms might be that they are suffering a disadvantage. The forms are not only written in formal statutory English, they are also obviously drafted with a common law background in mind which will typically affect the interpretation of the conditions. However, this disadvantage turns out to be not only a challenge but even an advantage if one focuses on the East European market. The reason is this: Some concepts employed by the FIDIC standard forms like “time at large” and “liquidated damages” are quite unknown in civil law although similar regulations exist (e.g. penalties). Other concepts like the powerful role of “the engineer” under the Red Book and the Yellow Book are completely new for civil law lawyers. On the other hand “hardship” and “force majeure” are quite similar to German law. These similarities and contradictions between the FIDIC contract forms and the substantive law in the jurisdiction, where they are used, will not even be discovered by engineers and lawyers, exclusively trained in common law; - while German lawyers and engineers have realized and already started to solve them. Because most East European jurisdictions have adopted either German or other continental civil law, the same problems will arise there and who has the remedy to cure them by becoming fair mediators between both systems? This is a challenge and a chance, especially for German engineers.

Sometimes, German lawyers contemplate whether certain provisions of the FIDIC conditions are unfair, unreasonable or even totally void pursuant to Paragraph 307 German Civil Code (abbreviated: BGB)[1]. Under this statute standard business terms are invalid if they put the other party to the contract in an unreasonably disadvantageous position, are drafted to the sole advantage of the drafter, are grossly one-sided or are totally unclear or incomprehensible.

The goal of this statute is not only consumer protection. It also applies to commercial contracts between merchants and thus to most cases that are governed by the FIDIC formulas, that by the way are not accepted as international trade customs or usage of the industry (lex mercatoria)[2]. German lawyers have challenged the FIDIC Silver Book in particular. Though it has to be admitted that the risk allocation policy of the Silver Book is very favourable for the employer and that the contractor assumes a lot of additional risks, one should also consider that the Silver Book has been drafted for very special purposes requiring strict compliance in respect to price and time arrangements.

Contrary to this criticism of the Silver Book, the Red Book and the Yellow Book are considered to be fair and balanced contract forms on the continent. They are even recommended by major public financing institutions like the German KfW banking group.

However, in spite of this good reputation especially Germans should be aware of common pit falls. For example: It is clear and widely accepted in international arbitration that disrespect for the notice and timely filing requirements regulated in clauses 20.1 and 3.5 are in fact a bar to claims, though German lawyers might be tempted to disregard these requirements by arguing the invalidity of these clauses under paragraph 307 German civil code. Likewise, the FIDIC concept (see clause 4.12) for ground conditions is as well very different from the view German law takes in this respect under which most of these risks lie with the employer.

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In order to avoid mistakes and misunderstandings it might be a good idea to become familiar with the Unidroit Principles of international commercial contracts (2004). For those, who like to check FIDIC conditions, it is recommended to compare them with the Unidroit Principles of international commercial contracts. Some of the concepts of FIDIC standard forms have also been adopted by Unidroit. When preparing the Particular Conditions of Contract the Unidroit Principles may be helpful as well to find a widely accepted, understandable and provable wording especially in order to comply with local applicable laws (see clause 1.13) and when modifications of the General Conditions are required in some jurisdictions.

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