

## FIDIC Conditions of Contract for Construction Multilateral Development Banks (MDB) Harmonised Edition

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PRESENTED AT THE  
FIDIC CONTRACTS USERS CONFERENCE  
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### MDB Harmonised Construction Contract

#### Contents:

- Participating Banks
- Background to MDB Edition
- Highlights of Bank specific amendments to Red Book (2006 Edition)
- Proposed 2010 MDB Edition modifications



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### MDB Harmonised Construction Contract

#### Participating Banks, include:

- The World Bank
- Islamic Bank for Development
- European Bank for Reconstruction and Development
- African Development Bank
- Asian Development Bank
- Black Sea Trade and Development Bank
- Caribbean Development Bank
- Council of Europe Development Bank
- Inter-American Development Bank



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### MDB Harmonised Construction Contract

#### Need

- MDBs have for many years adopted the FIDIC Construction Contract
- Regular practice was to introduce Particular Conditions that varied the General Conditions

#### Outcome

- Inefficiencies
- User uncertainties
- Increased possibilities for disputes

#### Response

Contract harmonisation: simplifies use for all users  
reduces the Particular Conditions.

Since May 2005

Multilateral development banks use the MDB  
Harmonised Construction Contract



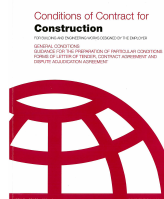
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### MDB Harmonised Construction Contract

#### Background

- International Standardization
- Same structure as FIDIC 1999 Red Book
- FIDIC principles of balanced risk allocation
- Tailored for Bank specific needs
- Management and copyright retained by FIDIC
  - licensed to MDBs
- First edition May 2005, updated March 2006
- Further updates anticipated in 2010



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### MDB Harmonised Construction Contract

#### Procedure

- Bank Heads of Procurement agreed and proposed changes to FIDIC
- Initial draft mainly the incorporation of existing MDB (mainly World Bank ) Particular Conditions (80 pages!)
- FIDIC Contracts Committee commented
- Review draft for review by contractors, unions, etc.
- Final draft
- FIDIC Executive Committee approval
- FIDIC licences Participating Banks
- Publication by FIDIC of CONS MDB



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**MDB Harmonised Construction Contract 2006**

**FIDIC Harmonised Contract translations**

	CONS MDB	CONS1	Responsibility
English	E	PE	FIDIC
French	E	(P)E	World Bank
Spanish	E	P	IADB
Portuguese	E	(PE)	IADB
Arabic	-	PE	FIDIC to licence association
German	-	PE	-
Russian	-	P	-
Chinese	-	P	FIDIC to licence association
Serbian	-	PE	-
Croatian	-	PE	-
Polish	-	P	-
Japanese	-	P	FIDIC to licence association

P: printed; E: electronic; () planned; PE – old edition

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**MDB Harmonised Construction Contract 2006**

**Bank Specific Amendments to Red Book:**

- Drafting clarifications
- Provisions which reduce Contractor's risk
- Similar obligations on the Employer as on the Contractor
- Definitions/Terminology
- Financial requirements
- Role of the Engineer
- Performance Security
- Nominated Subcontractors
- Staff and Labour/Health and Safety
- Ownership of Plant and Materials
- Commencement of Works
- Corrupt or Fraudulent Practices
- Establishment and use of a Dispute Board
- Banks' requirements for certain items

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**Supplement to the FIDIC Contracts Guide:**

- Details changes to the Red Book 1999
- Contains Notes to the MDB Harmonised Edition
- Tabulates the locations where words and phrases in the Red Book have been replaced in the MDB Harmonised Edition
- Compares the Red Book with the MDB Harmonised Edition, clause by clause, highlighting the changes
- Provides Notes on the Preparation of Particular Conditions for the MDB Harmonised Edition

[Available only as an electronic copy from FIDIC]

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**MDB Harmonised Construction Contract 2010**

**Proposed 2010 Modifications**

- Drafting clarifications and refinements (1.1.3.1, 1.1.6.10, 4.13, 6.22, 15.6, 20.4, 20.5)
- Updated financial requirements (4.2, 14.2, 14.9)
- Strengthened provisions:
  - 6.20 Forced labour
  - 6.21 Child labour
- New provisions:
  - 6.23 Worker's Organisations
  - 6.24 Non-discrimination and Equal Opportunity

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**Proposed 2010 Modifications (cont)**

- Reduced Contractor's risk:
  - 8.1 Commencement of Works
  - 16.2 Termination by Contractor
- Revised arbitration provisions:
  - International institutional arbitration if Contract with foreign contractor
  - Domestic arbitration under laws of Employer's country if contract with domestic contractor

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**THANK YOU**

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## Provisions which reduce Contractor's risk

### 1.13 Compliance with Laws

(b) the Contractor shall give all notices, pay all taxes, duties and fees, and obtain all permits, licences and approvals, as required by the Laws in relation to the execution and completion of the Works and the remedying of any defects; and the Contractor shall indemnify and hold the Employer harmless against and from the consequences of any failure to do so, unless the Contractor is impeded to accomplish these actions and shows evidence of its diligence.

### 2.1 Right of Access to the Site

... the Employer shall give the Contractor right of access to, and possession of, the Site within such times as required to enable the Contractor to proceed without disruption in accordance with the programme submitted under Sub-Clause 8.3 [Programme].



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## Provisions which reduce Contractor's risk

### 4.13 Rights of Way and Facilities

Unless otherwise specified in the Contract the Employer shall provide access to and possession of the Site including special and/or temporary rights-of-way which are necessary for the Works. The Contractor shall obtain, at his risk and cost, any additional rights of way or facilities outside the Site which he may require for the purposes of the Works.



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## Similar obligations on the Employer as on the Contractor

### 1.12 Confidential Details

The Contractor's and the Employer's Personnel shall disclose all such confidential and other information as the Engineer may be reasonably required in order to verify the Contractor's compliance with the Contract and allow its proper implementation.

Each of them shall treat the details of the Contract as private and confidential, except to the extent necessary to carry out their respective obligations under the Contract or to comply with applicable Laws. Each of them shall not publish or disclose any particulars of the Works prepared by the other Party without the previous agreement of the other Party. However, the Contractor shall be permitted to disclose any publicly available information, or information otherwise required to establish his qualifications to compete for other projects.



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## Similar obligations on the Employer as on the Contractor

### 2.5 Employer's Claims

The notice shall be given as soon as practicable and no longer than 28 days after the Employer became aware, or should have become aware, of the event or circumstances giving rise to the claim. A notice relating to any extension of the Defects Notification Period shall be given before the expiry of such period.



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## Definitions

- New definitions added to sub-clause 1.1 (Definitions)
  - Bank (1.1.2.11)
  - Borrower (1.1.2.12)
  - Completion (1.1.3.1)
  - Contract Data (1.1.1.9)
  - Payment Currencies (1.1.1.10)
  - Schedule of Payment Currencies (1.1.1.10)



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## Terminology

- "Dispute Adjudication Board" changed to "Dispute Board" (1.1.2.9)
- "Appendix to Tender" changed to "Contract Data" (1.1.1.10)
- "Reasonable Profit" changed to "Profit"
  - Profit set at 5% of cost, unless otherwise indicated in the Contract Data (1.2)
- "Tender" synonymous with "bid" (1.1.1.4 and 1.2(e))
- "provisions of the Particular Conditions" changed to Specification (1.1.3.6)



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## Financial Requirements

- Inspection and audit by banks (1.15)
  - New sub-clause -- Requires Contractors to permit Bank to:
    - Inspect Site and/or Contractor's accounts
    - Audit Contract performance records
- Employer's financial arrangements (2.4)
  - Added paragraph requiring the Employer to notify the Contractor:
    - In the event that the Bank suspends disbursements under the loan which finances the Works
    - Evidence of alternative funds available to enable the Employer to continue paying the Contractor after the Bank's suspension of payments
      - If no alternative funds, then Contractor is allowed to slow down or suspend work (16.1)
      - Contractor may terminate after 42 days if no funds available (16.2(a))



## Role of the Engineer

- The Employer may change the authority of the Engineer unilaterally, but must promptly inform the Contractor (3.1)
- The Engineer must obtain the Employer's specific approval before taking action under certain sub-clauses (3.1):
  - Agreeing extra time and cost for unforeseeable physical conditions (4.12)
  - Instructing a Variation (13.1), except:
    - In an emergency situation as determined by the Engineer, or
    - If such a variation would increase the Accepted Contract Amount by less than the percentage stated in the Contract Data
- Approving a Contractor's proposal for a Variation (13.1 or 13.2)
- Specifying amounts payable in each applicable currency (13.4)



## Role of the Engineer

- The Employer may change the Engineer unilaterally, but shall give full and fair consideration to any Contractor's objection if he considers the intended replacement Engineer to be unsuitable (3.4)
- Determinations must be made within 28 days unless otherwise specified (3.5)
- DB can be activated if the Engineer fails to respond within the time-limit (20.1)



## Performance Security

- At the Engineer's request may be increased/decreased for 25% change in the Contract Price due to a change in cost and/or legislation or Variation (4.2)



## Nominated Subcontractors

- Introduction of "pay-when-paid" clause for nominated sub-contractors (5.2 (c) (iii))
  - The nominated subcontractor is required to enter into a contract which includes that the nominated subcontractor shall "be paid only if and when the Contractor has received from the Employer payments for sums due under the Subcontract..."



## Staff & Labour -- Health & Safety

- Provisions of existing sub-clauses extended
  - Contractor encouraged to hire local staff (6.1)
  - Contractor required to inform employees of income tax laws and to deduct income tax if required by local laws (6.2)
  - Contractor required to conducted extensive HIV-AIDS awareness campaigns (6.7)



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**New Sub-Clauses in Clause 6:**

- Foreign Personnel (6.12)
- Supply of Foodstuffs (6.13)
- Supply of Water (6.14)
- Measures Against Insect and Pest Nuisance (6.15)
- Alcoholic Liquor or Drugs (6.16)
- Arms and Ammunition (6.17)
- Festivals and Religious Customs (6.18)
- Funeral Arrangements (6.19)
- Prohibition of Forced or Compulsory Labour (6.20)
- Prohibition of Harmful Child Labour (6.21)
- Employment Records of Workers (6.22)



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**Ownership of Plant and Materials**

- Ownership passes to Employer at earlier of: (7.7)
    - When incorporated into Works
    - Contractor is paid
- not when delivered to Site or the Contractor is entitled to payment as in the Red Book.



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**Commencement of Works**

- Only upon fulfillment of conditions precedent (8.1)
  - Signing of Contract
  - Evidence of Employer's Financial Arrangement
  - Possession of Site
  - Receipt of Advance Payment provided that Contractor's bank guarantee is in place



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**Corrupt or Fraudulent Practices**

- New clause in the MDB conditions (15.6)
  - Provides Employer's right to terminate in case of Contractor's engagement in corrupt, fraudulent, collusive or coercive practice.
  - Different definitions of corruption for various banks.



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**Establishment & use of a Dispute Board**

- Additional provisions on Appointment of the Dispute Board (20.2) –
  - Language of the DB members
  - First two appointed members recommend the chairman
  - Replacement of a member
- Failure to agree on the Dispute Board (20.3) – appointing entity to nominate member if a party fails to approve the other's nominee
- Arbitration provisions (20.6) –
  - Contracts with foreign contractors – international arbitration administered by appointed institution according to its rules or UNCITRAL rules, in the institution's home city
  - Contracts with domestic contractors – arbitration in accordance with the laws of the Employer's country



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**Bank's requirements for certain items****4.1 Contractor's General Obligations**

All equipment, material, and services to be incorporated in or required for the Works shall have their origin in any eligible source country as defined by the Bank.

**4.3 Contractor's Representative**

The Contractor's Representative shall be fluent in the language for communications defined in Sub-Clause 1.4 [Law and Language]. If the Contractor's Representative's delegates are not fluent in the said language, the Contractor shall make competent interpreters available during all working hours in a number deemed sufficient by the Engineer.



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## Bank's requirements for certain items

### 4.4 Subcontractors

The Contractor shall ensure that the requirements imposed on the Contractor by Sub-Clause 1.12 [Confidential Details] apply equally to each Subcontractor.

Where practicable, the Contractor shall give fair and reasonable opportunity for contractors from the Country to be appointed as Subcontractors.



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## Proposed 2010 Modifications in Detail

### 1.1 Definitions

1.1.3.1 "Base Date" means the date 28 days prior to the latest date for submission and completion of the Tender.

1.1.6.10 "Notice of Dissatisfaction" means the notice given by either Party to the other under Sub-Clause 20.4 [Obtaining Dispute Board's Decision] indicating its dissatisfaction and intention to commence arbitration.



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### 4.2 Performance Security

The Contractor shall obtain (at his cost) a Performance Security for proper performance, in the amount stated in the Contract Data and denominated in the currency(ies) of the Contract or in a freely convertible currency acceptable to the Employer. If an amount is not stated in the Contract Data, this Sub-Clause shall not apply.

The Contractor shall deliver the Performance Security to the Employer within 28 days after receiving the Letter of Acceptance, and shall send a copy to the Engineer. The Performance Security shall be issued by a reputable bank or financial institution selected by the Contractor, and shall be in the form annexed to the Particular Conditions, as stipulated by the Employer in the Contract Data, or in another form approved by the Employer.



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### 4.13 Rights of Way and Facilities

Unless otherwise specified in the Contract the Employer shall provide effective access to and possession of the Site including special and/or temporary rights-of-way which are necessary for the Works. The Contractor shall obtain, at his risk and cost, any additional rights of way or facilities outside the Site which he may require for the purposes of the Works.



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### 6.20 Forced Labour

The Contractor shall not employ forced labour, which consists of any work or service, not voluntarily performed, that is exacted from an individual under threat of force or penalty, and includes any kind of involuntary or compulsory labour, such as indentured labour, bonded labour or similar labour-contracting arrangements.



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### 6.21 Child Labour

The Contractor shall not employ children in a manner that is economically exploitative, or is likely to be hazardous, or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral, or social development. Where the relevant labour laws of the Country have provisions for employment of minors, the Contractor shall follow those laws applicable to the Contractor. Children below the age of 18 years shall not be employed in dangerous work.



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**6.22 Employment Records of Workers**

The Contractor shall keep complete and accurate records of the employment of labour at the Site. The records shall include the names, ages, genders, hours worked and wages paid to all workers. These records shall be summarized on a monthly basis and submitted to the Engineer, and these records shall be available for inspection by the Bank's auditors during normal working hours. These records shall be included in the details to be submitted by the Contractor under Sub-Clause 6.10 [Records of Contractor's Personnel and Equipment].



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**6.23 Workers' Organisations**

In countries where the relevant labour laws recognize workers' rights to form and to join workers' organisations of their choosing without interference and to bargain collectively, the Contractor shall comply with such laws. Where the relevant labour laws substantially restrict workers' organisations, the Contractor shall enable alternative means for the Contractor's Personnel to express their grievances and protect their rights regarding working conditions and terms of employment. In either case described above, and where the relevant labour laws are silent, the Contractor shall not discourage the Contractor's Personnel from forming or joining workers' organisations of their choosing or from bargaining collectively, and shall not discriminate or retaliate against the Contractor's Personnel who participate, or seek to participate, in such organisations and bargain collectively. The Contractor shall engage with such workers' representatives. Workers' organisations are expected to fairly represent the workers in the workforce.



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**6.24 Non-Discrimination and Equal Opportunity**

The Contractor shall not make employment decisions on the basis of personal characteristics unrelated to inherent job requirements. The Contractor shall base the employment relationship on the principle of equal opportunity and fair treatment, and shall not discriminate with respect to aspects of the employment relationship, including recruitment and hiring, compensation (including wages and benefits), working conditions and terms of employment, access to training, promotion, termination of employment or retirement, and discipline. In countries where the relevant labour laws provide for non-discrimination in employment, the Contractor shall comply with such laws. When the relevant labour laws are silent on non-discrimination in employment, the Contractor shall meet this Sub-Clause's requirements. Special measures of protection or assistance to remedy past discrimination or selection for a particular job based on the inherent requirements of the job shall not be deemed discrimination.



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**8.1 Commencement of Works**

(c) except if otherwise specified in the Contract Data, effective access to and possession of the Site given to the Contractor together with such permission(s) under (a) of Sub-Clause 1.13 [Compliance with Laws] as required for the commencement of the Works;



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**14.2 Advance Payment**

The Engineer shall deliver to the Employer and to the Contractor an Interim Payment Certificate for the advance payment or its first instalment after receiving a Statement (under Sub-Clause 14.3 [Application for Interim Payment Certificates]) and after the Employer receives (i) the Performance Security in accordance with Sub-Clause 4.2 [Performance Security] and (ii) a guarantee in amounts and currencies equal to the advance payment. This guarantee shall be issued by a reputable bank or financial institution selected by the Contractor and shall be in the form annexed to the Particular Conditions or in another form approved by the Employer.



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## MDB Harmonised Construction Contract 2010

**14.2 Advance Payment (cont)**

If the advance payment has not been repaid prior to the issue of the Taking-Over Certificate for the Works or prior to termination under Clause 15 [Termination by Employer], Clause 16 [Suspension and Termination by Contractor] or Clause 19.6 [Force Majeure] (as the case may be), the whole of the balance then outstanding shall immediately become due and in case of termination under Clause 15 [Termination by Employer], except for Sub-Clause 15.5 [Employer's Entitlement to Termination for Convenience], payable by the Contractor to the Employer.



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## MDB Harmonised Construction Contract 2010

**14.9 Payment of Retention Money**

Unless otherwise stated in the Particular Conditions, when the Taking-Over Certificate has been issued for the Works and the first half of the Retention Money has been certified for payment by the Engineer, the Contractor shall be entitled to substitute a guarantee, in the form annexed to the Particular Conditions or in another form approved by the Employer and issued by a reputable bank or financial institution selected by the Contractor, for the second half of the Retention Money. The Contractor shall ensure that the guarantee is in the amounts and currencies of the second half of the Retention Money and is valid and enforceable until the Contractor has executed and completed the Works and remedied any defects, as specified for the Performance Security in Sub-Clause 4.2. On receipt by the Employer of the required guarantee, the Engineer shall certify and the Employer shall pay the second half of the Retention Money. The release of the second half of the Retention Money against a guarantee shall then be in lieu of the release under the second paragraph of this Sub-Clause. The Employer shall return the guarantee to the Contractor within 21 days after receiving a copy of the Performance Certificate.



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**15.6 Corrupt or Fraudulent Practices**

If the Employer determines, based on reasonable evidence, that the Contractor has engaged in corrupt, fraudulent, collusive or coercive practices, in competing for or in executing the Contract, then the Employer may, after giving 14 days notice to the Contractor, terminate the Contractor's employment under the Contract and expel him from the Site, and the provisions of Clause 15 shall apply as if such expulsion termination had been made under Sub-Clause 15.2 [*Termination by Employer*].

Should any employee of the Contractor be determined, based on reasonable evidence, to have engaged in corrupt, fraudulent or coercive practice during the execution of the work then that employee shall be removed in accordance with Sub-Clause 6.9 [*Contractor's Personnel*].



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**16.2 Termination by Contractor**

(d) the Employer substantially fails to perform his obligations under the Contract in such manner as to materially and adversely affect the economic balance of the Contract and/or the ability of the Contractor to perform the Contract.



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**16.2 Termination by Contractor (cont)**

(h) In the event the Bank suspends the loan or credit from which part of the payments to the Contractor are being made, if the Contractor has not received the sums due to him upon expiration of the 14 days referred to in Sub-Clause 14.7 [Payment] for payments under Interim Payment certificates, the Contractor may, without prejudice to the Contractor's entitlement to financing charges under Sub-Clause 14.8 [Delayed Payment], take one of the following actions, namely (i) suspend work or reduce the rate of work, or (ii) terminate his employment under the Contract by giving notice to the Employer, with a copy to the Engineer, such termination to take effect 14 days after the giving of the notice.

the Contractor does not receive the Engineer's instruction recording the agreement of both Parties on the fulfilment of the conditions for the Commencement of Works under Sub-Clause 8.1 [Commencement of Works].



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**16.2 Termination by Contractor (cont)**

In the event the Bank suspends the loan or credit from which part or whole of the payments to the Contractor are being made, if the Contractor has not received the sums due to him upon expiration of the 14 days referred to in Sub-Clause 14.7 [Payment] for payments under Interim Payment certificates, the Contractor may, without prejudice to the Contractor's entitlement to financing charges under Sub-Clause 14.8 [Delayed Payment], take one of the following actions, namely (i) suspend work or reduce the rate of work under Sub-Clause 16.1 above, or (ii) terminate his employment under the Contract by giving notice to the Employer, with a copy to the Engineer, such termination to take effect 14 days after the giving of the notice.



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**20.4 Obtaining Dispute Board's Decision**

If either Party is dissatisfied with the DB's decision, then either Party may, within 28 days after receiving the decision, give a notice of dissatisfaction to the other Party indicating its dissatisfaction and intention to commence arbitration. If the DB fails to give its decision within the period of 84 days (or as otherwise approved) after receiving such reference, then either Party may, within 28 days after this period has expired, give a notice of dissatisfaction to the other Party.



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**20.5 Amicable Settlement**

Where a notice of dissatisfaction has been given under Sub-Clause 20.4 above, both Parties shall attempt to settle the dispute amicably before the commencement of arbitration. However, unless both Parties agree otherwise, the Party giving a Notice of Dissatisfaction in accordance with Sub-Clause 20.4 above should move to commence arbitration after the fifty-sixth day from the day on which a notice of dissatisfaction was given, even if no attempt at an amicable settlement has been made.



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**20.6 Arbitration**

Any dispute between the Parties arising out of or in connection with the Contract not settled amicably in accordance with Sub-Clause 20.5 above and in respect of which the DB's decision (if any) has not become final and binding shall be finally settled by arbitration. Arbitration shall be conducted as follows:

- (a) if the Contract is with foreign contractors,
- (1) for contracts financed by all participating Banks except under subparagraph (a) (2) below [*Asian Development Bank*];  
 international arbitration (i) with proceedings administered by the arbitration institution designated in the Contract Data, and conducted under the rules of arbitration of such institution; or, if so specified in the Contract Data, (ii) international arbitration in accordance with the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL); or (iii) if neither an arbitration institution nor UNCITRAL arbitration rules are specified in the Contract Data, with proceedings administered by the International Chamber of Commerce (ICC) and conducted under the ICC Rules of Arbitration; by one or more arbitrators appointed in accordance with said arbitration rules.



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**20.6 Arbitration (cont)**

- (b) if the Contract is with domestic contractors, arbitration with proceedings conducted in accordance with the laws of the Employer's country.

The place of arbitration shall be the neutral location specified in the Contract Data, and the arbitration shall be conducted in the language for communications defined in Sub-Clause 1.4 [*Law and Language*]



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