

FIDIC® MDB HARMONISED CONSTRUCTION CONTRACT

March 2006 version

Changes to the FIDIC® Construction Contract General Conditions, 1st Edition, 1999

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A number of Multilateral Development Banks (MDBs) have, for many years, adopted the FIDIC® Conditions of Contract for Construction 1st Edition 1999 as part of their standard bidding documents, which the MDBs require their borrowers or aid recipients to follow. In using the FIDIC Conditions, it has been the regular practice of the MDBs to introduce additional clauses in the Special Conditions in order to amend provisions contained in the General Conditions. These additional clauses, which are specific to the MDBs, have in many cases standard wording which has had to be repeated whenever procurement documents have been prepared for a new project. Furthermore, the provisions in tender documents, including the additional clauses contained in the Particular Conditions, have varied between the MDBs. This has created inefficiencies and uncertainties amongst the users of the documents and increased the possibilities of disputes.

These problems were recognised by the MDBs as significant, as were the benefits of standardisation. In response, the MDBs resolved to harmonise their tender documents on an international basis. They chose the FIDIC Conditions of Contract for Construction 1st Edition 1999, and resolved that there should be a modified form in which the General Conditions would contain the standard wording which previously had been incorporated by MDBs in the Particular Conditions.

FIDIC also recognised the major benefits to the users of the contracts of such harmonisation, and has been pleased to work with the MDBs to produce a special MDB Harmonised Edition of the FIDIC® Conditions of Contract for Construction for contracts financed by the MDBs. FIDIC retains the copyright and the responsibility for managing the MDB Harmonised Edition. It should be noted that the MDB Harmonised Edition is for use on MDB financed projects, and does not replace FIDIC's standard 1999 Construction Contract, which is still available as before for all users where MDB funding is not involved. Moreover, some MDBs allow tenderers to choose between the 1st and MDB Harmonised Editions.

The result is, in effect, a new and different set of FIDIC Construction Contract General Conditions for use by bank's borrowers when contracting for the type of construction for which the FIDIC Construction Contract historically has been used - remeasured contracts using bills of quantities, with construction supervised by "the Engineer". Readers sensitive to legal issues will recognise the potential problems of the banks making such use of FIDIC's copyrighted conditions. These have been overcome by a separate agreement with FIDIC enabling Participating Banks to do what they have done, but requiring continued recognition that the copyright remains with FIDIC, even though FIDIC does not necessarily agree that the changes to its document are what FIDIC itself would recommend.

There has been some confusion on the various versions of the MDB Harmonised Contract. MDBs that have taken a licence to use the FIDIC Harmonised Edition are in fact licensed to use the contract's General Conditions, which are then incorporated into standard bidding documents. MDBs that have acquired a licence are called Participating Banks because they participate in the development of the MDB Harmonised Edition. The first version was released by FIDIC to the Participating Banks in May 2005 and a second version was released in March 2006. The latter is the current version, and is available on FIDIC's website at www.fidic.org/mdb. FIDIC also supplies complete conditions of contract that have Particular Conditions' forms and other documents included as a complete contract. This is available as an encrypted electronic PDF file, where the encryption ensures authenticity of the General Conditions. Users are encouraged to purchase

this version to ensure authenticity because the freely available electronic version of the General Conditions can be adjusted.

It should be noted that the contract data and other forms in FIDIC's complete conditions of contract for the MDB Harmonised Edition are modelled on the forms included in the World Bank standard bidding documents. However, these forms are only provided for convenience and as a guide: users should obtain the Particular Conditions Part A forms from the relevant Participating Bank's standard bidding documents.

In March 2007, the Participating Banks approved "no objection" procedures that will expand considerably the use of the MDB Harmonised Construction Contract. The procedures enable FIDIC to:

- a) licence bilateral agencies to use the Harmonised Construction Contract General Conditions on their projects;
- b) grant organizations, mainly FIDIC Member Associations, licences to prepare and publish translations (the banks themselves are responsible for preparing French, Spanish and Portuguese translations of the MDB Harmonised Construction Contract General Conditions).

This text aims to summarise the changes to the standard 1st Edition 1999 of the FIDIC Construction Contract General Conditions (hereafter called CONS1) that are incorporated in the MDB Harmonised Edition of the contract (March 2006 version, hereafter called CONS MDB). Some minor changes are not commented upon. All changes are listed in the MDB Harmonised Contract supplement to the *FIDIC Contracts Guide* (available in electronic form from the FIDIC Bookshop).

The comments are based on the author's personal observations and do not reflect FIDIC's interpretation of changes to the FIDIC Construction Contract, 1st Edition 1999.

A. Summary of the changes

A.1. Introduction

The *MDB Harmonised Construction Contract Supplement to the FIDIC Contracts Guide* published by FIDIC lists the differences between CONS1 and CONS MDB, and gives a side-by-side comparison of all sub-clauses that have been changed. Readers should consult this supplement in order to follow the description below of the changes. The supplement is only available as an electronic version, and can be purchased from the FIDIC Bookshop at www.fidic.org/bookshop.

The first thing to say is that the CONS MDB is very close to CONS1. The layout, clauses, wording, standard forms, balanced risk-sharing, etc. are virtually the same. CONS MDB includes a number of additional sub-clauses, particularly dealing with the contractor's obligations towards his staff and labour force, which one would generally have found in the Particular Conditions of many contracts. CONS MDB also contains some specific requirements of any MDB, e.g., the right of the bank to audit the contractor's accounts. Finally, in drafting CONS MDB with the MDBs, FIDIC has taken the opportunity to make a few minor improvements, particularly to the Dispute Board provisions.

There are, however, a few changes which would not be agreed by FIDIC for general use, as they could tend to tilt the accepted balance of risk in favour of the employer. For example, the employer may more easily change the authority of the engineer and may more easily replace the engineer. These changes are referred to as "bank-specific". The MDBs have argued that an employer using their funding must be able to change an engineer who is mis-performing, and if the contractor really has a grievance about such change, he will certainly refer to the funding MDB who will ensure that fair play is sustained.

An interesting and important point which has come about due to CONS MDB is that it is now required that a Dispute Board (DB) be used for all construction projects of more than US\$10 million, not just recommended. Also the DB will now make a decision instead of just a recommendation. This decision will

be binding on the Parties, who shall ‘promptly give effect to it unless and until it shall be revised in an amicable settlement or an arbitral award’.

Some of the changes that the Participating Banks have adopted in CONS MDB are, in most observers’ view, perhaps not advised for a variety of reasons. These changes, designated “not advised”, are often merely possibly unsuitable and unnecessary. Very few, if any, can be considered as being so ill-advised that they should be removed.

Thus, apart for a few general changes in the structure and format of the FIDIC Construction Contract 1st Edition 1999, specific changes in the MDB Harmonised Edition of the Construction Contract are classified below in the detailed clause-by-clause analysis as:

- Improved wording, e.g., useful clarifications, simplifications and additions; acceptable requirements
- Bank-specific
- Contractor’s position balanced
- Contractor’s obligations increased
- Employer’s position balanced
- Not advised

A.2. Summary

Simple changes that affect many clauses

- ‘Appendix to Tender’ becomes ‘Contract Data’ - and is entirely filled in by Employer (1.1.1.10)
- ‘Contract Data’ becomes Part A of Particular Conditions.
- ‘reasonable profit’ becomes ‘profit’ because profit is now fixed at 5% in CONS MDB.
- ‘Dispute Adjudication Board’ = ‘DAB’ is simplified to ‘Dispute Board’ = ‘DB’

Clause 1

- ‘Bank’ and ‘Borrower’ defined
- ‘Unforeseeable’ - ‘and against which adequate preventive precautions could not reasonably be taken.’ added (1.1.6.8)
- ‘tender’ synonymous with ‘bid’, ‘tenderer’ = ‘bidder’(1.2)
- ‘Versions of contract in different languages’ removed (1.4)
- Any error - not only ‘technical’- to be informed (1.8)
- Contract details to be confidential (1.12)
- Bank may inspect or audit contractor’s accounts (1.15)

Clause 2

- Contractor to be informed if the bank suspends disbursement (2.4)
- Employer claims: notice to be given as soon as the employer becomes aware or should have become aware of the event (2.5)

Clause 3

- Employer may change the authority of engineer (3.1)
- Engineer to obtain specific approval of employer before acting:
- 4.12: extra time/cost for unforeseeable physical conditions.
- 13.1: instructing a variation (except in emergency, or below a stated amount) or approving a contractor’s proposal (13.2)
- Easier for employer to change the engineer (3.4)

Clause 4

- Material, services etc from eligible source country (4.1)
- Performance security (4.2) - unnecessary wording deleted.
- Performance security may be increased/decreased for 25% variation.
- If contractor's representative not fluent, then interpreters required (4.3)
- Subcontractor's: confidentiality required (4.4)
- Reasonable opportunity for subcontractor from the country.
- Environment (4.18): wording tightened.

Clause 6

- 6.1: employ staff and labour from country.
- 6.2: inform personnel about liability to taxes.
- 6.7 - health & safety - add HIV-AIDS prevention.
- 6.12 to 6.22 - added clauses usually in Particular Conditions.
- New: prohibition of forced labour; harmful child labour.

Clause 8

- Delay by employer's personnel anywhere (not only on site).

Clause 12

- Evaluation, if no rate given (12.3)

Clause 13

- Adjustments for changes in legislation: no adjustment if already covered by cost escalation (13.7)

Clause 14

- Contractor's equipment exempt from import duties (14.1)
- If Bank loan is suspended, employer to pay in 14 days (14.7)
- Bank guarantee can be provided for retention (14.9)
- Retention guarantee not required if performance bond covers 50%.

Clause 15

- Employer cannot terminate to avoid the contractor terminating (15.5)
- Corrupt practices added - defined in Notes (15.6)

Clause 16

- If Bank suspends funds, the contractor can suspend work (16.1)
 - Under CONS1 is then entitled to extra time/cost plus profit.
 - Removed in CONS MDB
- If bank suspends funds, contractor can either suspend or terminate (16.2)
- Employer's failure limited slightly by MDB wording (16.2(d))
- Indemnity by contractor enlarged: from that caused by contractor, to cover all damage or loss however arising except only that attributable to employer (17.1(b))

Clause 17

- Employer's risks - added wording doubtful. Sabotage (17.3)

- Limitation of Liability (17.6): no liability for indirect loss except:
 - Delay damages added.
 - But 16.4 termination for employer fault omitted.
 - Stated limit changed to 'multiplier' (or Accepted Contract Amount).

Clause 18

- Insurances - can be placed with eligible source company (18.1)

Clause 19

- Force Majeure - sabotage (not contractor's personnel) added (19.1)
- Payment on foreign money: costs 'necessarily' added (19.6(c))

Clause 20

- DAB changed to Dispute Board = DB (20.2 - 20.4)
- Several minor changes (and improvements), e.g.:
 - 'suitably qualified' includes professional experience in work type.
 - 'if a list included in Contract' omitted.
 - 'Parties may jointly refer for opinion' omitted.
 - notice of dissatisfaction 'and intention to commence arbitration'
- Arbitration as stated in the Particular Conditions, otherwise ICC (20.6)

Appendix A - General Conditions

- If parties cannot agree fee then named entity will decide
- Annex -Procedural Rules 2: 'endeavour to prevent disputes'.

B. Changes in Detail

B.1. General Changes

In CONS MDB:

- a) Particular Conditions have Part A (Contract Data) completely filled in by the Employer and replacing the CONS1 Appendix to Tender. So reference to Appendix to Tender in CONS1 has been changed in CONS MDB to Contract Data. This restructuring makes the contract more user-friendly.

Some new bank-specific items have been added to the Contract Data, such as the Bank's details. Also added:

- if the relevant part is filled in, a percentage increase on the Accepted Contract Amount above a certain limit will require the Employer's approval;
 - a provision that, if required, to set out the maximum total liability of the Contractor to the Employer;
 - one of the conditions governing the commencement date is the signing of the Contract Agreement by both parties. This serves to ensure that the Contract is signed.
- b) The contractor now submits his information by way of separate schedules (Bill of Quantities; Daywork Schedule; Schedule of Payment Currencies). The advantage is that information is cleanly separated. However, a checklist is often needed so that the contractor knows what to supply.
- c) The word "Adjudication" is deleted throughout from Dispute Adjudication Board.

B.2. Specific changes

1.1. Definitions

1.1.3.6. Test after Completion

In CONS MDB, tests after completion are to be in the specifications, not the Particular Conditions. However, requirements for other tests are given in the Particular Conditions so it might in fact have been wiser to have all tests in the CONS MDB Particular Conditions.

1.1.1.9. Bill of Quantities

In CONS MDB, the definition includes a "Schedule of Payment Currencies". A schedule of payment currencies is added in definitions since Sub-clause 14.15 specifically requires a Schedule of Payment Currencies ("The Contract Price shall be paid in the currency or currencies named in the Schedule of Payment Currencies.") instead of currencies being named in the Appendix to Tender, as is the case in CONS1, which becomes the Contract Data of Particular Conditions - Part A in Cons MDB.

1.1.2 11. Bank

In CONS MDB, "Bank" is defined, which is clearly a Participating Bank requirement.

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1.1.3.7. Defects Notification Period

CONS MDB has added “which extends over 12 months except if otherwise stated”, so the duration of the defects notification period is defined. This is appropriate for a bank-specific definition.

1.1.5.5. Plant

CONS MDB has the addition “, including vehicles purchased for the Employer and relating to the construction or operation of the Works”, which is appropriate for a bank-specific definition. Vehicles are something that should be noted since costs can mount, sometimes unexpectedly.

1.1.6.7. Site

CONS MDB includes “storage and working areas”, which is an unnecessary addition.

1.2. *Interpretation*

Bank-specific

For certain claims clauses, CONS MDB requires profit to be “5% of the Cost” and not “Cost plus reasonable profit”. So “reasonable” has been deleted everywhere in CONS MDB. Under CONS1, the contractor can argue for reasonable costs: this is now excluded. It is questionable whether the change is wise as it is arbitrary to set 5% whereas the engineer or even a dispute board could decide, depending on the circumstances. Moreover, some contractors include engineering and currency risks as part of the cost, so 5% may be insufficient. The addition is an example of an adoption of one of the suggested Particular Conditions given in the guidance to CONS1.

1.4. **Law and Language**

Improved wording

The law and language sub-clause of CONS1 has been simplified in CONS MDB by essentially requiring that contracts be in only one language. This means that the language for communications can simply be the ruling language of the contract, as opposed to the language in which most of the contract is written. However, the sub-clause is now unable to handle the case where a ruling language is not specified in the contract data.

No definition is provided of “ruling language” so it is presumed that this is the language in which the majority of the document was written.

1.5. *Priority of Documents*

Not advised

The letter of tender is a simple one-page document whereas the tender is all of the tender documentation. In CONS MDB, “Letter of Tender” has been changed to “Tender”. By removing “Letter of”, the whole of the tenderer’s offer and documentation will take precedence over, e.g., the Conditions of Contract and the specifications and drawing prepared by the employer. The tenderer’s offer and documentation should be last in the order of priority.

Improved wording

The change in CONS MDB form Appendix to Tender to Contract Data in the Particular Conditions means a change in the order of priority from CONS1. The Particular Conditions - Part A with the Contract Data are now fourth in the order of priority, followed by the Particular Conditions - Part B,

which are the project specific conditions. The complete MDB Harmonised conditions of contract published by FIDIC, unlike CONS1, gives no guidance for the preparation of Particular Conditions, because, apart from the Contract Data and related forms, there should be no project-specific Part B Particular Conditions.

1.6. *Contract Agreement*

Not advised

The CONS1 wording, “The Parties shall enter into a Contract Agreement within 28 days after the Contractor receives the Letter of Acceptance, unless they agree otherwise” becomes in CONS MDB, “unless the Particular Conditions establish otherwise”. This is clearer on how agreement is expressed, but is probably an unnecessary change.

1.8. *Care and Supply of Documents*

Not advised

In CONS MDB, , “of a technical nature” has been deleted to give: “If a Party becomes aware of an error or defect in a document which was prepared for use in executing the Works, the Party shall promptly give notice to the other Party of such error or defect.” So in CONS MDB, any error in a document must be reported. This is possibly a drafting error and it may not have been intended to remove “of a technical nature”. It has certainly extended the meaning of the sub-clause.

1.9. *Delayed Drawings and Instructions*

Not advised

In CONS MBD, “details of” has been deleted in “and details of the nature and amount of the delay or disruption”. This is satisfactory, but not advised.

1.12. *Confidential details*

Contractor’s position balanced

In CONS MDB, “The Contractor” is replaced by “The Contractor’s and the Employer’s Personnel” and “Each of them shall treat the details.....” added, so more stringent and now mutually binding on both parties, and more balanced. These changes have been introduced mainly because greater confidentiality is required.

Bank-specific

A paragraph is added in CONS MDB that clarifies the requirement of confidentiality (“Each of them shall treat the details of the Contract as private and confidential, except.....”). This paragraph raises several issues:

- a) To show that the parties have been able “to carry out their respective obligations under the Contract or to comply with applicable Laws” there may result in much correspondence between the contractor and the engineer and/or employer, which would lead to the disclosure of confidential details which the engineer and/or employer should not know (e.g., information contained applications for lines of credit by the contractor). Hence, there is a phrase saying that the parties should keep such information confidential. But there is no indication of where this obligation of confidentiality stops, since many documents will have been widely circulated.
- b) Subcontractors: how are details of the contract disclosed to interested sub-contractors?

- c) Sensitive sites: what happens if the contract concerns a sensitive site (e.g., a road on a military camp?). A phrase such as “except where the Employer instructs otherwise” is required.
- d) Duty to disclose: what happens if a government employer discloses, and a complete ban on disclosure is impossible?

The effect of the changes is that the wording is less one-sided so that both parties must, if it is reasonable to do so, disclose confidential information. The last sentence of the added paragraph will be of particular relief for contractors bidding on new projects.

1.13. *Compliance with Statutes, Regulations and Laws*

Contractor’s position balanced

In CONS MDB, the building permit is now the responsibility of employer.

Contractor’s position balanced

In CONS MDB, the contractor must indemnify the employer for any failure, “unless the Contractor is impeded to accomplish these actions and shows evidence of its diligence”. This addition means that the contractor has more flexibility.

The changes between CONS1 and CONS MDB do not meet contractor’s objections that the responsibility of obtaining permissions is ambiguous. Ideally the contract should include a detailed schedule of the permits required and the party responsible for obtaining these permits. One way would be to allocate the obligation to obtain permits, licences and approvals for the permanent works to the employer, and allocate the obligation to obtain temporary permits, etc. to the contractor. And one asks the question: what happens if the contractor is impeded?

1.15 *Inspections and Audit by the Bank*

Bank-specific

A clause has been added in CONS MDB giving power to the bank power to check and investigate the contractor’s use of money which has been provided by the bank.

However, there is no specific requirement of confidentiality and it is not thought that the bank is necessarily caught by the provisions of 1.13, so the contractor might want to clarify this before granting the access required by the sub-clause.

2.1. *Right of Access to the Site*

Improved wording

In CONS MDB, “without disruption” added so the contractor has easier access, and his position is improved. These words serve to reinforce the requirement that the employer must give the contractor access in such a way that there is no impediment on the contractor working in accordance with the programme.

2.2. *Permits, Licences and Approvals*

Improved wording

In CONS MDB, “(where he is in a position to do so)” is deleted and the CONS1 wording, “The Employer shall (where he is in a position to do so) provide reasonable assistance to the Contractor at the request of the Contractor:” becomes, “The Employer shall provide, at the request of the

Contractor, such reasonable assistance as to allow the Contractor to obtain properly:”. So more obligation on the employer, and the wording clearer. However, the employer should not become liable in any way for the success or failure of the contractor’s applications. Also, the word “properly” is unclear.

These two changes, both or which are said to favour the contractor, by clarifying and adding to what the employer must do. By deleting “where he is in a position to do so”, any grounds for the employer to argue that he could not assist have been removed.

2.4. *Employer’s Financial Arrangements*

Bank specific

By changing “If the Employer intends to make” to “Before the Employer makes”, the employer only has to give notice if he actually makes any material change to his financial arrangements. This will have the effect of pushing back the time when the employer needs to inform the contractor of any such change.

Improved wording

A new paragraph in CONS MDB imposes the obligation on the employer to notify the contractor if the bank suspends disbursements under the loan. Sub-clauses 16.1 and 16.2 have been amended so that the contractor can suspend work or terminate the contract in these circumstances.

The new paragraph also adds the requirement that the employer shall submit evidence that financial arrangements have been made that will enable him to pay for the works before the commencement date. This action does not depend upon the contractor having made a request for the employer to do so.

The new paragraph is potentially of particular benefit to the contractor as it provided that the employer must notify the contractor within seven days if a bank has suspended payment of a loan which may be financing the project, thereby giving the contractor an early warning.

Not advised

CONS MDB refers to “appropriate currencies”, which is unclear. If this refers to the currencies of payment under the contract, this should be stated.

2.5. *Employer’s Claims*

Bank-specific

CONS MDB specifies that, “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,” so the 28-day notification is now also for employer, and the employer is under greater pressure should he envisage making a claim, which is relatively rare. In any event, the employer’s and contractor’s procedures for making claims are now more similar, which is an improvement. However, it is noted that:

- the situation for employers is often very different from the situation for which the contractor is claiming;
- employers tend to be less claims conscious than contractors;
- the addition may cause considerable confusion because the employer can always argue that the contractor should have known and given notice sooner.

The standard CONS1 formulation is more objective: it requires notice only after the contractor has actual evidence of the facts or circumstances giving rise to the claim. However, some observers feel that there is a fundamental problem of a the lack of balance: there is a 28-day time limit for contractor claims and a “as soon as possible time limit” for employer claims.

The new words introduce an additional subjective reasonableness test. Whereas before all that mattered was when the employer actually became aware of the circumstances giving rise to a claim. Now consideration needs to be given to when the employer should have realised that a claims situation had arisen. However, in reality nothing has changed except in extreme circumstances. There is still no time limit to serve as a condition precedent which might serve to deprive the employer of the opportunity to make a claim.

3.1. *Engineer’s Duties and Authority*

Bank-specific

In CONS MDB, “The Employer undertakes not to impose further constraints on the Engineer’s authority, except as agreed with the contractor” has been changed to “The Employer shall promptly inform the Contractor of any change to the authority attributed to the Engineer”.

Under CONS1, the employer undertook not to change the basis of the engineer’s authority without the agreement of the contractor. This has been changed to give the employer the right to make whatever changes it likes to the basis of the engineer’s authority. The only restriction is that he must inform the contractor. There is no longer any requirement that the engineer must agree to these changes.

The change would seem to weaken the contractor’s perception of the autonomy, objectivity and independence of the engineer’s contractual position. There is concern that this sub-clause could be misused by unscrupulous employers. For instance, if the contractor has priced his tender knowing that a reputable international engineer will treat him fairly, it is inconsistent to allow in the contract for the employer to have the possibility to change the engineer for another of lower integrity, who might not be fully independent, or has insufficient professional qualifications. However, it is a sensible simplification and allocation of control, since to change the engineer’s authority, the employer now only has to notify the contractor of his intention to do. Moreover, if the employer intends to change the engineer under Sub-clause 4.3, he now has the authority to change the engineer’s authority within a notice period.

As the change implies that the employer can change the engineer’s authority without limit, some of the reservations include:

- a) there is a risk that the change will contradict other requirements on the engineer to act according to the contract;
- b) the contractor is unable to price at the time of tender the risk element of a change of engineer;
- c) the date when the change comes into effect is unclear;
- d) as the engineer is acting more as the employer’s agent it may be necessary to clarify his independence in measurement/determination provisions (e.g., Sub-clauses 12 and 20) which do not require the engineer to act reasonably or independently;
- d) it is generally thought to be unacceptable by contractors because the employer can alter the engineer’s authority under the contract unilaterally, thus changing the balance of risk after the contract price has been agreed.

If the MDB wording is maintained, it may be necessary to consider:

- a) a requirement that the employer provides the contractor with copies of the original documents confirming the engineer's authority under Sub-clause 3.1, as well as copies of the documents that alter this authority;
- b) provisions in the sub-clause giving entitlement to the contractor to any additional time or costs that may flow from the change to the contractor's authority.

Bank-specific

Added in the CONS MDB sub-clause is a long paragraph saying "Any act by the" which clarifies the engineer's authority in detail. The MDBs require the right to change the engineer and his authority, so the addition makes clear what should happen if the engineer's authority is changed. The restrictions which are stated will limit the power of the engineer to approve and commit the employer to additional payments, or extension of time, without prior approval, except in an emergency. The addition also confirms the limited extent of the restrictions which the MDBs consider necessary.

Added is a list of actions for which specific approval is required by the engineer from the employer. It is taken from earlier optional recommendation in the World Bank standard bidding documents. The main changes to these optional recommendations are:

- a) the action of the engineer to determine additional cost is no longer tied only to the unforeseeable conditions terms of the contract, but is more general;
- b) the engineer must now seek approval in order to take action to determine the amounts payable in applicable currencies; the engineer now has the power to order and pay for additional work that is instructed as a result of an emergency that threatens life, the works or adjoining property.

This change can be viewed as fettering the engineer, particularly in the fact that the new clause says that the engineer cannot agree or determine any extension of time or cost consequence of the said extension without the employer's approval.

3.4. *Replacement of the Engineer*

Bank-specific

In CONS MDB, "The Employer shall not replace the Engineer with a person against whom the Contractor raises reasonable objection" with "If the Contractor considers the intended replacement Engineer to be unsuitable, he has the right to raise objection against him" so the employer's position is strengthened and the realistic view that the contractor cannot prevent an employer changing the engineer prevails. It is noted that the issues raised for Sub-clause 3.1 above apply.

In CONS MDB, the notice period is reduced from 42 to 21 days, so CONS MDB has a more stringent requirement for the employer than in CONS1, but with a more workable procedure. However, there may be insufficient time for the contractor to collect his supporting documents.

So under CONS MDB, the employer may more easily change the authority of the engineer and may more easily replace the engineer. This could tend to tilt the accepted balance of risk in favour of the employer. The Participating Banks have argued that an employer using their funding must be able to change an engineer who is mis-performing, and if the contractor really has a grievance about such change he will certainly refer to the funding Participating Banks who will ensure that fair play is sustained.

In effect, the ability of the contractor to object to the replacement has been considerably weakened and thereby the employer has far more freedom in its choice of a replacement engineer.

3.5. *Determinations*

Improved wording

In both CONS1 and CONS MDB, the engineer shall consult the parties and issue a determination with no restriction on the time for its issue. Added to CONS MDB is “within 28 days from the receipt of the corresponding claim or request except when otherwise specified” giving a time limit for the engineer to make determinations. It may be useful to change the last word to “agreed”.

Not advised

CONS MDB Sub-clause 3.5 seems to be incorrect in the context of Sub-clause 20.1. Sub-clause 3.5 states that, “The Engineer shall give notice within 28 days from receipt of the corresponding claim...”.

According to Sub-clause 20.1, the contractor shall give notice to the engineer, describing the event or circumstance giving rise to the claim. The notice shall be given as soon as practicable, and not later than 28 days after the contractor became aware, or should have become aware, of the event or circumstance. Under 3.5, the engineer is now obliged to give notice to each party of each agreement or determination ... within 28 days from the receipt of the corresponding claim or request except when otherwise specified. That is not possible, because Sub-clause 20.1 remains unchanged. According to Sub-clause 20.1 “within 42 days after the Contractor became aware (or should have become aware) of the event or circumstance giving rise to the claim, or within such other period as may be proposed by the Contractor and approved by the Engineer, the Contractor shall send to the Engineer a fully detailed claim which includes ...”. Thus, the engineer is not able to determine a claim within 28 days.

While the new 28 period might be considered to be tight, this time limit is common elsewhere. It should be noted that there is no provision for the time limit to be extended, although presumably the parties could choose to extend the time limit if they so chose.

Note that the engineer’s determination must be fair according to the contract, which under CONS1 means profit is allowed, but under CONS MDB , the engineer must assess profit as 5% of the cost.

4.1. *Contractor’s General Obligations*

Bank-specific

Added in CONS MDB is, “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.” so as to restrict the countries from which equipment, etc. can be obtained. A list of countries will be needed in the tender documents.

This addition amounts to a prohibition on the use of any materials from those countries deemed by the banks not to be eligible.

4.2. *Performance Security*

Bank specific

In CONS MDB, deleted is the list of situations in which the employer can claim on the performance security.

Moreover, the employer can now make a claim under the performance certificate when “he is entitled to an amount under the contract”. Making it easier for the employer to claim is perhaps unwise because the list helps avoid unjustified claims that:

- a) create disputes and a poor working atmosphere for the project team;
- b) overcomes the problem that the general obligation for indemnification “to the extent to which the Employer was entitled to make the claim” is often by itself insufficient to prove apparent misuse of claims in a court. However, it still retains the indemnity by the employer in the event that the employer makes a claim to which he is not entitled.

In CONS MDB, a paragraph has been added that requires the contractor to increase or decrease the value of the performance security if the contract price changes by more than 25% in certain circumstances.

If the contract price goes up by more than 25%, if the engineer requests, the contractor must secure an increase in the performance security by an equivalent percentage. If the contract price falls by more than 25% then a similar reduction can be made. The key factor of whether or not a reduction or increase is required is at the discretion of the engineer. Therefore the contractor cannot decrease the value of any security unless the engineer agrees to such a reduction.

Issues are:

- a) The question of what happens if there are smaller changes that cumulatively exceed 25%. Sub-clause 1-2(b) on the singular versus plural would normally mean that several additions or reductions together amounting to more than 25% would trigger the change in the value of the performance certificate. For greater clarity, one suggestion would be to add “cumulatively exceed”.
- b) The contractor’s obligation is not matched by an obligation upon the employer to increase the amount of the payment guarantee where the contract sum increases.
- c) Being able to both increase and decrease the performance security on the basis of a basket of currencies will require contractors to provide long-term security in several currencies.
- d) The sub-clause now refers to a “portion of the Contract Price” which is unclear.
- e) It is not clear from the wording whether the circumstances giving rise to the 25% threshold amount would flow from a single event or variation, or from the accumulation of a series of events.

It has been recommended that the addition be modified to:

- a) remove the discretionary authority of the engineer to request increases or decreases in the value of the performance security;
- b) ensure that any change in the contract price determined by the engineer would arise from an accumulation of events.

4.3. Contractor's Representative

Improved wording

“in terms of Sub-clause 6.9 [Contractors Personnel]” has been added, having the effect of preventing the unjustified removal of the contractor's personnel since the sub-clause lists the grounds for removal, assuming the grounds are implied.

Bank specific

As anticipated by the CONS1 Particular Condition guidance, CONS MDB has the addition, “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.” So that the contractor must provide interpreters if his staff is not fluent in the language of communication, and the fluency requirements have been relaxed for other persons. Both are perhaps not generally advised since qualified staff fluent in the language of communications are often available and are able to handle the technical and administrative aspects of a construction site much more satisfactorily than even the best interpreters.

4.4. Subcontractors

Clarification

The word “solely” is added in CONS MDB which confirms that a materials supplier who does not install materials does not have to be agreed by the engineer. Only materials are covered by this prior consent because they are much easier to test on site, compared with say equipment.

Bank specific

A paragraph has been added in CONS MDB that demands confidentiality from subcontractors.

As set out above, Sub-clause 1.12 has been substantially expanded. The sub-clause now extends a duty on the contractor to treat any information about the contract, unless it is publically available, as confidential. The purpose of the changed 4.4 is to ensure that the contractor extends the duty to any sub-contractors under the contract.

A paragraph is also added which aims to encourage the use of local companies as subcontractors. However, the contractor is still responsible for his subcontractors, and will still want to submit an economic tender in order to obtain the contract, so the practical effect of this addition is unclear.

This paragraph amounts effectively to a request that the contractor gives local contractors a fair opportunity to work on the project. This was suggested in the CONS1 Particular Conditions guidance.

4.6. Co-operation

Improved wording

The CONS MDB addition of “causes the Contractor to suffer delays and/or to” could perhaps be changed to “causes the Contractor to incur Unforeseeable Cost and/or delay”. This would be a useful clarification. Thus an instruction shall constitute a variation if it causes the contractor to suffer delays and not just if it causes the contractor to suffer unforeseeable cost.

4.12. *Unforeseeable Physical Conditions*

Not advised

In CONS MDB, adding “notice under” to “If and to the extent that the Contractor encounters physical conditions which are Unforeseeable, gives such a notice, and suffers delay and/or incurs Cost due to these conditions, the Contractor shall be entitled subject to notice under Sub-Clause 20.1[Contractor’s Claims] to:...” is not advised because the contractor must comply with other requirements such as keeping contemporary records, under Sub-clause 20.1.

Not advised

CONS MDB changes the last paragraph by adding “the Contractor’s interpretation” and changing “may” to “shall” to give “The Engineer shall take account of any evidence of the physical conditions foreseen by the Contractor when submitting the Tender, which shall be made available by the Contractor, but shall not be bound by the Contractor’s interpretation of any such evidence.” These changes are not advised since the contractor should be able to include as the basis for his tender the physical conditions he foresaw.

The contractor should be aware that under the last paragraph that if he provides the engineer with the “baseline” evidence, the engineer may take account of it, but is not bound by any such evidence in making a determination under Sub-clause 3.5. By adding the words “the Contractor’s interpretation” of the evidence, the CONS MDB is reinforcing the point that the engineer is not bound by the evidence.

Improved wording

In the fifth paragraph, changing “Upon” to “After” is a useful improvement.

Unnecessary

In the fifth paragraph, changing “may” to “shall” is unnecessary. It means that the engineer must take account of any evidence put forward by the contractor, but there is no change to the ultimate meaning of the paragraph since the engineer is not bound by that evidence.

4.13. *Rights of Way and Facilities*

Not advised

The change in CONS MDB to “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.” is not advised because rights of access and possession of the site are covered in Sub-clause 2.1 and do not need to be repeated. This sub-clause should only deal with the special and/or temporary rights-of-way which the contractor may require and which are not the employer’s concern.

This change is important for the contractor because it confirms that it is the employer who must provide access to and possession of the site. This is in accordance with 2.1. In addition, it is the employer and no longer the contractor who is responsible for any ordinary, special or temporary rights of way that are necessary for the works.

4.15. Access Route

Not advised

The addition of “Base Date in CONS MDB to give “and availability of access routes to the site at Base Date”” is unnecessary as it is understood.

By 1.1.3.1, the base date means the date 28 days prior to the latest date for the submission of the tender. The only possible advantage is that this addition adds some certainty about the suitability of access routes since the relevant date of the contractor’s knowledge should be fixed at that time.

4.18. Protection of the Environment

Improved wording

The change in CONS MDB from “shall not exceed the values indicated in the Specification, and shall not exceed the values prescribed by applicable Laws.” to “shall not exceed the values stated in the Specification or prescribed by applicable Laws.” gives possibly improved wording that represents a tightening of the provisions.

The first change has little practical effect. The second serves to strengthen the requirement that the contractor must ensure that emissions, discharge or effluent do not exceed the level stated in the contract.

4.19. Electricity, Water and Gas

Not advised

The change in CONS MDB of adding “for his construction activities and to the extent defined in the Specifications, for tests” is unnecessary.

4.23. Contractor’s Operations on Site

Not advised

The addition of “as additional” in CONS MDB to give “and agreed by the Engineer as additional working areas” is unnecessary.

5.1 Definition of “nominated Subcontractor”

In CONS MDB, adding “subject to Sub-clause 5.2” is unnecessary as this is dealt with in Sub-clause 5.2.

5.2. Objection to Nomination (of Nominated Subcontractors)

In both CONS1 and CONS MDB, the contractor is not obliged to employ a nominated subcontractor who has adequate experience and financial capacity but who will not undertake to the contractor such obligations and liabilities that will enable the contractor to discharge his obligations and liabilities under the contract.

Improved wording

Changing “the subcontract does not specify” to “the subcontractor does not accept to indemnify” is improved wording as it is more accurate, but does not change the meaning.

Contractor-balance improved

A “pay-when-paid” contractor-friendly provision added: “(iii) be paid only if and when the Contractor has received from the Employer payments for sums due under the Subcontract referred to under Sub-Clause 5.3 [Payment to nominated Subcontractors].” In other words the nominated subcontractor has to accept this “pay when paid” clause which gives potentially significant protection to the contractor. In putting in this new clause are moving against the trend where pay-when-paid clauses are prohibited.

Specifying “in writing” is unnecessary, but adds certainty so is sensible.

Not advised

In sub-paragraphs (b) and (c) of the second paragraph, changing “the subcontract does not specify that the nominated Subcontractor shall” to “the nominated subcontractor does not accept to”, the CONS1 wording covers the CONS MDB wording, so the change is unnecessary. The same is the case for changing “specify ...” to “accept to enter into a contract which specifies that for ...”

5.3. *Payment to nominated Subcontractors*

Not advised

In CONS MDB, “shown on the nominated Subcontractor’s invoices approved by the Contractor” has been added, possibly for clarification. But this addition appears to contradict the addition to 5.2(c)(iii) which says that the contractor only has to pay the sub-contractor when it actually receives its money from the employer.

6.1. *Engagement of Staff and Labour*

Clarification

A new sentence “The Contractor is encouraged, to the extent practicable and reasonable, to employ staff and labour with appropriate qualifications and experience from sources within the Country.” only encourages and does not require the use of local staff and labour. It is self-explanatory.

6.2. *Rates of Wages and Conditions of Labour*

Useful addition

An addition to CONS MDB on informing staff of their obligations is useful as it supports efforts to improve business integrity. It reads: “The Contractor shall inform the Contractor’s Personnel about their liability to pay personal income taxes in the Country in respect of such of their salaries, wages, allowances and any benefits as are subject to tax under the Laws of the Country for the time being in force, and the Contractor shall perform such duties in regard to such deductions thereof as may be imposed on him by such Laws.”

The addition serves to make the obligation on the contractor one step further by imposing on him the obligation to inform the contractor’s personnel about income tax liability. However, it may be necessary to consider imposing an obligation on the contractor or imposing a sanction for non-compliance. It is noted that sub-contractors are not covered.

6.7. Health and Safety

Bank specific

Detailed procedures to combat the spread of HIV-AIDS are now included in CONS MDB. The contractor must implement these procedures, which will presumably be included in an item in the bill of quantities following the Policy and Practice Note published by FIDIC. A specific reference to a responsibility for the implementation of a health and safety plan (attached say, to the specification) may be wise in order to enlarge the scope of health and safety beyond HIV-AIDS.

6.11. Foreign Personnel

Bank specific

It is noted that in this new sub-clause in CONS MDB, the words “The Contractor shall be responsible for the return of these personnel to the place where they were recruited” may be unrealistic and may require wording along the lines “Responsible for facilitating the return”.

6.13 – 6.22 Additional Staff and Labour Clauses

Bank-specific

Additional sub-clauses in CONS MDB cover different aspects of the local welfare requirements for the employment of staff and labour. Most are:

- a) already standard practice;
- b) were include in the CONS1 guidance for Particular Conditions;
- c) are covered elsewhere;
- d) must be considered in relation to the governing law and regulations which may cover the same requirements, especially since the contract conditions do not specify sanctions for non-compliance.

6.22. Employment Records of Workers

Bank-specific

The requirement for the contractor to keep employment records for workers is possibly a useful addition. However, it is covered by Sub-clause 6.10 [Records of Contractor’s Personnel and Equipment]. Moreover, since the records cover subcontractors’ staff it is a very onerous task for the contractor not directly related to construction (e.g., what happens if subcontractors do not collaborate?).

7.4. Testing

Not advised

The addition in CONS MDB of “Except as otherwise specified in the Contract,” is unnecessary as this is always applicable and does not need to be said for every sub-clause.

7.7. Ownership of Plant and Materials

Not advised

The addition in CONS MDB of “Except as otherwise provided in the Contract,” is unnecessary as this is always applicable, and does not need to be said for every sub-clause.

Bank-specific

There are two changes:

- a) For the replacement in CONS MDB of “delivered to the Site” with “incorporated in the Works”, the normal procedure is ownership on delivery to the site, although the exact situation often depends on the local law. The Participating Banks’ procedure of ownership upon incorporation in the works is satisfactory, but it is questioned whether this is a better formulation given that local laws will prevail.
- b) The replacement of “entitled to payment of the” by “paid the corresponding” means that the contract becomes the owner of the plant and materials when he is paid rather than entitled to payment. Once again, this is satisfactory, but it is questioned whether this is a better formulation given that local laws will prevail

The two changes can be considered to favour the contractor, as previously the plant became the property of the employer when it was delivered to the site or when the contractor was entitled to be paid. Now plant has to be incorporated in the works and/or the contractor actually has to be paid for that plant before ownership changes hands.

8.1. Commencement of Works

Bank-specific

In CONS1, the letter of acceptance trigger the start of the contract. The notice to commence cannot be issued before the date seven days after the receipt by the contractor of the letter of acceptance.

CONS MDB restructures the sub-clause and introduces conditions precedent terms where the letter of acceptance no longer triggers the start of the contract.

The standard and fairly straightforward paragraph, “The Engineer shall give the Contractor not less than 7 days’ notice of the Commencement Date. Unless otherwise stated in the Particular Conditions, the Commencement Date shall be within 42 days after the Contractor receives the Letter of Acceptance.” is replaced by a paragraph which notes: “Except as otherwise specified in the Particular Conditions of Contract”, which is obvious and does not need to be said.

CONS MDB adds that: “the Commencement Date shall be the date at which:

- a) “the Engineer’s instruction recording the agreement of both Parties on such fulfilment and instructing to commence the Work is received by the Contractor” that limits the Engineer’s authority to commence the works;
- b) “the following precedent conditions have all been fulfilled:”
 - signature of the Contract Agreement by both Parties, and if required, approval of the Contract by relevant authorities of the Country;
 - delivery to the Contractor of reasonable evidence of the Employer’s Financial arrangements;
 - possession of the Site given to the Contractor together with such permission(s) as required for the commencement of the Works;

- receipt by the Contractor of the Advance Payment provided that the corresponding bank guarantee has been delivered by the Contractor.

So there are five precedent conditions, amongst which are: the employer's duties for the signature of the contract; possession of the site; receipt by the contractor of the advance payment.

The Participating Banks clearly feel that it is necessary to make very clear the precedent conditions, especially the conditions the employer must fulfil. The problem is to know what happens if they are not met by one of the parties. In particular, is there immediate commencement, or is notice given? What if the contractor does not ask for evidence of the employer's financial arrangements?

The changes are of some benefit to the contractor: the project cannot commence unless the contract agreement has been signed by both parties, the contractor has in his possession reasonable proof that the employer can fund the works and the contractor has received any advance payment that he is entitled to. All these are stated in the conditions precedent. Significantly, the contractor can terminate the contract in accordance with Sub-clause 16 if no instruction is received.

However, the actual time of commencement date is probably less clear. Under CONS1 there was a 42-day window. Now there appears to be a potential 180-day window as there is no commencement date until the engineer's instruction has been received by the contractor.

Bank-specific

The Participating Banks add a provision in CONS MDB for the case where the engineer does not receive any instructions for the engineer: "If the said Engineer's instruction is not received by the Contractor within 180 days from his receipt of the Letter of Acceptance, the Contractor shall be entitled to terminate the Contract under Sub-Clause 16.2 [Termination by Contractor]."

8.4. *Extension of Time for Completion*

Not advised

The deletion of "on the Site" implies that the Employer will now take responsibility for delays caused by his other contractors, whether or not they are working on the same site. The deletion thus expands the grounds for which a contractor might be entitled to an extension of time as a delay caused by the employer need no longer be confined to an act or omission which takes place on the site.

8.6. *Rate of Progress*

Not advised

In CONS MDB, the addition of "notice under" to "If these revised methods cause the Employer to incur additional costs, the Contractor shall subject to notice under Sub-Clause 2.5 [Employer's Claims]" is unnecessary since the employer must comply with all requirements under Sub-clause 2.5, for example, by giving particulars.

Improved wording

The addition in CONS MDB of a paragraph saying that the employer shall pay for measures to reduce delays without leading to any extra payment for the contract is a useful addition. The paragraph reads: "Additional costs of revised methods including acceleration measures, instructed by the Engineer to reduce delays resulting from causes listed under Sub-Clause 8.4 [Extension of Time for Completion] shall be paid by the employer, without generating, however, any other additional payment benefit to the contractor.

However, while a useful addition, the words “without generating” are unclear. While the contractor is now entitled to payment for the costs of accelerating measures provided they are instructed by the engineer, the words “without generating, however, any other additional payment benefit to the contractor” strongly suggests that the contract is not entitled to the payment of any profit on top of these costs.

8.7. *Delay Damages*

Not advised

In CONS MDB, the addition of “notice under” is unnecessary since the employer must comply with all requirements under Sub-clause 2.5, for example, by giving particulars.

8.12. *Resumption of Work*

Not advised

This CONS1 sub-clause says that if it is decided to resume work, the contractor shall make good any deterioration or defect in or loss of the works or plant or materials, which has occurred during the suspension. The addition in CONS MDB of: “after receiving from the Engineer an instruction to this effect under Clause 13 [Variations and Adjustment]” means that the contractor should not carry out any such work unless he has received an appropriate instruction from the engineer.

The addition is unnecessary because if suspension was due to the contractor, the contractor will have to repair at his cost; and if it is due to the employer, the employer will have to pay under Sub-clause 8.9 which covers the resumption of work. Making good any deterioration only after receiving an instruction from the engineer under the variation provisions of the contract is implied under CONS1.

11.3. *Extension of Defects Notification Period*

Not advised

The word “damage” has been replaced in CONS MDB “by reason of a damage attributable to the Contractor” so the employer is now entitled to an extension of the defects notification period if the works or a major item of plant cannot be used for the purposes for which they are intended owing to a defect or to damage attributable to the contractor, and not owing to damage of any form.

In CONS1, the employer could only seek an extension when the defect or damage is attributable to the contractor. The addition is unnecessary because the employer must be entitled to the full defects notification period if a major item cannot be used some time and is then replaced or repaired, regardless of the source of the problem. If the cause of the defect or damage was not the contractor’s fault he would be entitled to claim under Sub-clause 20.1 and entitled to be paid under a variation (Sub-clause 11.2).

11.11. *Clearance of Site*

Not advised

In CONS MDB, the replacement of “the Employer receives a copy” with “receipt by the Contractor” to give “If all these items have not been removed within 28 days after receipt by the Contractor of the Performance Certificate, the Employer may sell or otherwise dispose of any remaining items.” is unnecessary because the Contractor may receive the Performance Certificate under Sub-clause 11.9 before the Employer receives his copy (“Performance of the Contractor’s obligations shall not be considered to have been completed until the Engineer has issued the Performance Certificate to the

Contractor, stating the date on which the Contractor completed his obligations under the Contract. A copy of the Performance Certificate shall be issued to the Employer.”). The obligation is on the engineer to inform the contractor, with no mention of timing. If this change is kept, Sub-clause 11.9 will need to be changed at some stage.

12.1. Works to be Measured

Not advised

The addition in CONS MDB of “The Contractor shall show in each application under Sub-Clauses 14.3 [Application for Interim Payment Certificates], 14.10 [Statement on Completion] and 14.11 [Application for Final Payment Certificate] the quantities and other particulars detailing the amounts which he considers to be entitled under the Contract.”.

This is an important change which places an obligation upon the contractor to identify quantities applied for on his applications. The practical effect of the change is to be seen, but it may mark a shift towards the engineer focussing on the contractor’s application as opposed to his own measurement. The changed is not advised because:

- a) It has been said elsewhere in the appropriate sub-clauses (see Sub-clauses 14.3, 14.10, 14.11).
- b) Repeats that the contractor must submit detailed particulars concerning his entitlements under the contract both with interim statements under Sub-clause 14.3 and with the application for final payment under Sub-clauses 14.10 and 14.11. However, if the “particulars detailing amounts which he considers to be entitled” are reserved only for the final payment, the sanction, namely loss of entitlement, is obvious. If the particulars are for both interim statements and applications for final payment, sanctions for non-compliance are needed but these are not supplied.
- c) This sub-clause deals with measurement, whereas certification is dealt with in Sub-clause 14.6

Not advised

In CONS1, the works are measured and valued for payment. Wherever any permanent works are to be measured from records, the records shall be prepared by the engineer. If the contractor disagrees the records, then the contractor shall give notice to the engineer of why the records are inaccurate. The engineer then reviews the records and either confirms or varies them. The banks then add as another task “and certify the payment of the undisputed part.”

This imposes an important additional obligation on the engineer. It is minor because noting areas of agreement forms part of the engineer’s measurement role in this event, but important since the more items that can be certified and thus formally agreed and moved out of arenas for potential dispute. The addition is unnecessary since Sub-clause 12.1 deals with measurement, whereas certification should be dealt with in Sub-clause 14.6, where this issue is already covered.

12.3. Evaluation

Bank-specific

A new paragraph has been added in CONS MDB stating, “Any item of work included in the Bill of Quantities for which no rate or price was specified shall be considered as included in other rates and prices in the Bill of Quantities and will not be paid for separately.” This could have a potentially severe effect on the contractor depending on the nature and cost of any item left unpriced in the bill of quantities as this addition clearly makes the contractor responsible for any additional costs caused by the omission.

To confirm that if a rate or price has not been inserted against a particular work item in the bill of quantities then it is included in other rates or prices. Note the use of the past tense “was” (“for which no rate or price was specified”) instead of say “is”. In general, the addition is unwise since:

- a) Specifying what should happen for items that have no rate will create opportunities for disputes.
- b) The method of measurement should make it clear what is to be included in the bill of quantities so it is unclear why items will not have a rate or price.

Employer’s position balanced

In the paragraphs saying that a new rate or price shall be appropriate for an item of work if the measured quantity of the item is changed by more than 10% from the quantity of this item in the bill of quantities or other schedule, or if this change in quantity multiplied by such specified rate for this item exceeds 0.10% of the accepted contract amount, the figures 10% and 0.10% are replaced by 25% and 0.25%, possibly recognizing that the earlier figures were not realistic for the requirement to consider a new rate or price. This is a pro-employer change as the increase in the threshold amount is of no benefit to the contractor.

Aside from the general issue that contractors will try to avoid clauses specifying quantity limits taking effect, the 25% limit appears excessively high since an employer wishing to avoid more reasonable thresholds should consider using a lump-sum contract.

Also, it has been suggested that consideration should be given to extending the application of changes in quantities and values from single-bid items to classes of work or section of the bill of quantities.

Useful addition

Adding “as soon as the concerned Works commences” is a sensible addition that sets a time limit as to when the engineer should set any additional rates.

13.1. *Right to Vary*

Contractor’s position balanced

Variations may be initiated by the engineer at any time prior to issuing the taking-over certificate (by an instruction or by a request for the contractor to submit a proposal). The contractor shall execute each variation, unless he gives notice to the engineer stating that he cannot readily obtain the goods required for the variation.

CONS MDB has added an additional possibility for the contractor to reject a variation and is not bound to carry out an instruction for varied work. This is when “such Variation triggers a substantial change in the sequence or progress of the Works”. It will be for the contractor to demonstrate why the change is a substantial one. This change is seen as balancing the contractor’s position. Under Sub-clause 13.3 [Variation Procedure], the employer can consider whether it is worth carrying out the variation or not in the case where the proposed variation causes a substantial change in sequence that is reflected in variation’s time and cost given by the contractor. Nevertheless, the engineer still has the right, having considered the objection, to ignore the contractor and proceed to confirm the variation.

13.7. *Adjustments for Changes in Legislation*

Bank-specific

In CONS MDB, a paragraph has been added to avoid duplication between this Sub-clause 13.7 and other clauses: “Notwithstanding the foregoing, the Contractor shall not be entitled to an extension of time if the relevant delay has already been taken into account in the determination of a previous extension of time and such Cost shall not be separately paid if the same shall already have been taken into account in the indexing of any inputs to the table of adjustment data in accordance with the provisions of Sub-Clause 13.8 [Adjustments for Changes in Cost].

The paragraph has been added to ensure that there is no possibility of the contractor being able to duplicate either any claim for additional time or money as a consequence of this sub-clause, notwithstanding the obvious difficulties in such an attempt being made in the first place.

The paragraph is superfluous since:

- a) the entitlement has already been taken into consideration;
- b) the use of indices to bar cost increases has some perverse effects. For example, legislative and/or regulatory changes occur more-or-less immediately whereas the accompanying cost increases lag well behind. There have been major disputes since some employers argue that costs increases in say electricity are not allowed since the increase in cost of electricity is included in another index such as a consumer price index.

13.8. *Adjustments for Changes in Cost*

Clarification

The table of adjustment data in CONS MDB refers specifically to “local and foreign currencies included in the Schedules”.

In a new paragraph in the CONS MDB sub-clause, there is no adjustment for changes in legislation if adjustment is already covered by cost escalation.

14.1. *The Contract Price*

Bank-specific

In a new paragraph in CONS MDB, construction equipment is exempt from import duties, which is a bank requirement. This new paragraph introduces a potentially significant exception to the contractor’s liability to pay taxes and other duties.

14.2. *Advance Payment*

Bank-specific

In CONS MDB, the wording of the repayment procedures has been improved, e.g., shall “deliver to the Employer and the Contractor is clearer than “shall issue”. This is probably unnecessary.

The words “advance payment” have been added to cover this possibility, giving “an interim Payment Certificate for the advance payment or its first installment”. This is probably unnecessary.

Addition of “and cash flow support” probably unnecessary. The change reinforces in contractual terms one of the benefits to the contractor of the advance payment.

The change of “may” to “shall” be progressively reduced is not advised since the reduction depends on the terms of the guarantee. There is now a requirement that the amount of the loan be progressively reduced through payment certificates.

Deductions can now be amortised at a variable rate instead of at a fixed 25%.

In a move that favours the contractor, the CONS MDB sub-clause has been modified substantially by changing the repayment schedule set up in sub-paragraph (b) of CONS1 to start repayment when the value of the interim payment certificates exceeds 30% of the accepted contract amount and to complete repayment prior to the time when the value of the interim certificates reach 90% of the accepted contract amount.

A phrase has been added that says that deductions can be made at the (variable) amortisation rate, provided the advance payment shall be completely repaid prior to the time when 90% of the accepted contract amount less provisional sums has been accepted for payment.” This is a bank safeguard that implies a more specific time limit for repayment.

The limits for when deduction shall commence in the next interim payment certificate have been raised from 10% to 30% of the accepted contract amount.

The addition in the final paragraph of the CONS MDB sub-clause that the whole of the balance of the advance payment becomes due in the case of termination by the employer is only appropriate for Participating Banks.

Improved wording

Reworded to “Unless otherwise stated in the Contract Data” which helps improve clarity.

Percentage deductions are now “from the interim payment certificates determined by the Engineer” which is clearer than “in Payment Certificates”.

The wording has been improved for what is excluded from the deductions.

14.3. *Application for Interim Payment Certificates*

Clarification

In CONS MDB, for the contractor’s statement, the wording is clarified for the case when there is more than one payment instalment, but there is no fundamental change in the meaning.

14.4. *Schedule of Payments*

Bank-specific

Under CONS1, here scheduled payments are not defined by actual progress of the works and where the progress of the works was found to “be less” than that for which the schedule of payments was based, then the engineer under sub-paragraph (c) could determine reduced revised instalments. CONS MDB adds “or more” such that the engineer may now proceed to determine a revised payment schedule for both less and more.

So if actual progress is not only “less” than but also “more” than the schedule upon which payment are based, the engineer can determine revised installments. This seems reasonable if a client agrees.

However, in CONS1, the principle is not to pay earlier if the contractor's progress is in advance of the schedule, since the employer may not have allowed for earlier payment in his cash flow. There seems to be no good reason for changing this practical approach.

14.5. *Issue of Interim Payment Certificates*

Not advised

CONS MDB has "deliver" instead of "issue", has added "to the Contractor" in addition to the Employer and added "for any reduction or withholding made by the Engineer on the Statement if any". Changing "issue" to "deliver" places an obligation on the contractor to ensure that the certificate reaches the employer, and also (in another addition), the contractor. These changes to CONS1 are considered unnecessary.

14.7. *Payment*

Bank-specific

There are two substantial additions to two paragraphs. Both these additions serve to extend the time within which the employer has to make payment in the limited set of circumstances that are detailed, namely when the loan credit is suspended. If the bank loan is suspended, the Employer must pay in 14 days.

14.8. *Delayed payment*

Improved wording

In CONS1, for calculating financing charges for late payments, the calculation is based on three percentage points above the annual discount rate of the central bank of the country of the currency of payment. CONS MDB adds a provision in the second paragraph of this sub-clause that deals with the situation where the "discount rate" is not available: "if not available, the interbank offered rate"

14.9. *Payment of Retention Money*

Bank-specific

A retention guarantee is not required if the performance bond covers 50% (i.e., the limit has been increased from 40% in CONS MDB to 50%).

Two lengthy paragraphs have been added that allow the contractor to provide guarantees for the release of the retention money, unless otherwise stated in the Particular Conditions.

These additions attempt to deal with the problem that is often encountered whereby contractors suffering difficulty in achieving the repayment of the retention by reducing the retention bond.

14.11. *Application for Final Payment Certificate*

Bank-specific

For the issue of the draft final statement, CONS MDB adds a time restriction of 28 days in the second paragraph of the sub-clause for the engineer to request any further information he may require for correcting and issue of the final statement. Thus a limit has been imposed for the submission by the contractor of further information. But it should be noted that no equivalent time limit has been imposed on the engineer to consider the information.

14.13. *Issue of Final Payment Certificate*

Bank-specific

In CONS MDB, the CONS1 paragraph (a) has been changed to refer to “the amount which he fairly determines is due”. This is unnecessary.

14.15. *Currencies of Payment*

The references to the Appendix to Tender are changed in COMS MDB to refer to the Schedule of Payment Currencies.

15.5. *Employer’s entitlement to Termination for Convenience*

Clarification

The sub-clause title has been changed in CONS MDB to reflect the sub-clause content.

Bank-specific

The phrase “or to avoid a termination of the Contract by the Contractor under Clause 16.2” has been added in CONS MDB to the first paragraph so that the employer cannot now terminate to avoid the contractor terminating.

The reason for the introduction of the new restriction on the employer’s ability to terminate would appear to be to prevent the employer from stepping in to prevent the contractor from operating its own right to terminate.

In addition, the contractor is now entitled to be paid under Sub-clause 16.4 which deals with payment on termination, rather than 19.6. However, while this change might initially be seen to be of little consequence, as 16.4 cross-refers to 19.6(c) it in fact gives the contractor the right to “loss of profit or other loss or damages sustained” as a consequence of termination.

In CONS1, the contractor is reimbursed all his costs for termination by the employer for convenience, as is also the case for termination under Force Majeure. The proposed change would mean that the contractor receives payment for consequential damages as well. This is a significant addition, and one that the Participating Banks have chosen.

15.6. *Corrupt or Fraudulent Practices*

Bank-specific

In CONS MDB, there are specific corruption sub-clause text for each Participating Bank, and where a particular Participating Bank does not specify text, the text of the World Bank wording applies by default. This sub-clause extends the definition of corrupt or fraudulent practice beyond that commonly applied in Particular Conditions.

If the employer determines that the contractor has engaged in a fraudulent act under this definition he may terminate the contract and expel the contractor from the site by giving 14’ days notice.

So there is one key difference: under 15.6, 14 days’ notice must be given; under the similar 15.2(f), a termination notice may be served immediately.

The inclusion of the words “in executing the Contract” as distinct from the “procurement process” may have far-reaching implications in the administration of the contract. The new Sub-clause 15.6 is

more widely drawn than 15.1(f), by, for example, making it clear that the tendering process must be clear as it refers to both “competing for” and “executing” the works. For instance, if the employer determines that the contractor has inflated a claim for additional costs that would affect the financial arrangements for the contract, he may terminate the contract and expel the contractor from the site. The remedies available to the contractor are not defined.

Furthermore, the conduct of fraudulent practice only applies to the contractor. It is not clear whether a wilful breach of contract by the employer or the engineer by not taking required action “in executing the Contract” that would affect the contractor’s financing of the work would fall under the definition of fraudulent practice, and would entitle the contractor to either suspend work under Sub-clause 16.1 or terminate the contract under Sub-clause 16.2.

16.1. Contractor’s Entitlement to Suspend Work

Not advised

CONS MDB adds a second paragraph to the sub-clause that extends the terms entitling the contractor to suspend or reduce the rate of progress to include the suspension of disbursements from the loan or credit which finances the whole or part of the works, where the loan or credit must be that “from which payments to the Contractor are being made”.

So if a Participating Bank suspends funds, the contractor can suspend work. Under CONS1, the contractor would then be entitled to extra time/cost plus profit. This has effectively been removed in CONS MDB, which is possibly a mistake and rewording may be needed. The addition certainly provides additional protection to the contractor.

16.2. Termination by the Contractor

Not advised

Sub-paragraph (d) has been extended. The question here is whether the addition adds clarity. If anything, the new words restrict the scope for argument. They certainly restrict the contractor’s ability to terminate since the employer’s breach must now have one of two specified consequences.

In CONS MDB sub-paragraph (d), the employer’s failure is limited slightly by the new wording that probably adds nothing.

In addition, two new paragraphs have been added. The contractor must give 14 days’ notice of termination under both of these paragraphs.

If the Bank suspends funds, the contractor can either suspend or terminate. Put another way, the contractor may terminate if the employer’s failure to perform affects a) the “economic balance” of the contract or, b) his ability to perform. As reflected in CONS MDB, there seems to be some confusion in the Participating Banks over when this can happen:

- a) In CONS MDB a sub-paragraph (h) has been added to the sub-clause that entitles the contractor to terminate the contract with 14-days’ notice if the Participating Bank suspends the loan or credit from which payments are made and the contractor has not received sums due to him within the 14 days referred to in Sub-clause 14.7.
- b) A further sub-paragraph (i) is added that permits the contractor to terminate with 14-days’ notice if he “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”.

The new sub-paragraph (h) is an extension from the new sub-paragraph added in 16.1. Sub-paragraph (i) deals with the change to 8.1 which in itself is one of the more significant CONS MDB changes. It sets out a number of pre-conditions, stated in the conditions, precedent, which must be fulfilled before the project can commence. If the engineer's instruction to commence is not received within 108 days from the receipt of the letter of acceptance, then the contractor is entitled to serve a notice of termination.

16.4. *Payment on Termination*

Bank specific

In CONS MDB, the provision for loss of profit has been deleted from paragraph (c) thereby deleting the qualifications on the type of loss the contractor can seek to recover. This seems unfair to the contractor because the termination was caused by default of the employer.

17.1. *Indemnities*

Not advised

The revised paragraph (d) of CONS MDB is perhaps more logical than in CONS1 because the indemnity by the contractor does not require negligence, wilful act or breach of contract by the contractor, but is excluded by negligence, wilful act or breach of contract by the employer. The indemnity by the contractor is thus enlarged from that caused by the contractor to cover all damage or loss however it arises, except only that attributable to the employer.

The effect of the amendments is to bring the contractor's obligation to indemnify in relation to damage to property in line with its obligations in respect of personal injury. Under CONS1, the indemnity only applied where it was attributable to the contractor's negligence, wilful act or breach of contract. This obligation has been extended and now applies to all damage and loss, however caused, unless that damage is caused by the negligence, wilful act or breach of contract to the employer. This amendment thus increases the contractor's indemnity obligations. This is not advised.

17.3. *Employer's Risks*

Clarification

IN CONS MDB, the CONS1 sub-clause has been changed so that the risks only apply if they directly affect the execution of the works in the country. This narrows the risks.

Paragraphs (b) and (c) have been changed to exclude sabotage by the employer's personnel, which is logical.

The change to paragraph (c) only deletes a repetition because the definition of Contractor's Personnel in 1.1.2.7 includes employees of the contractor and subcontractors.

17.6. *Limitations of Liability*

Bank-specific

CONS MDB modified the CONS1 exclusion of consequential damages in the first paragraph of this sub-clause to the effect that such exclusion would not apply to any delay damages under Sub-Clause 8.7 [Delay Damages] and several other sub-clauses, and not only to Sub-Clauses 16.4 and 17.1. The purpose of this addition is to make absolutely clear that certain items, for instance delay damages, are not covered by the limitation of liability set out in the first paragraph.

So in CONS MDB, there is no liability for indirect loss and delay damages, cost of remedying defects and intellectual and industrial property rights.

From the addition to the second paragraph, the limit to liability can now be calculated using a multiplier of more than or less than one that is specified in the contract data. To avoid any possibility of dispute it might have been simpler if a fixed limit was adopted rather than a multiplier or any other form of calculation.

18.1. *General Requirements for Insurance*

Bank-specific

Through additions to the CONS1 third paragraph of this sub-clause, CONS MDB extends the requirements for insurance when the employer is the issuing party. The terms of the insurance shall be acceptable to the contractor and consistent with the terms agreed by the parties before the issue of the letter of acceptance which agreement shall take precedence over the terms of the sub-clause.

In CONS1, while policies taken out by the contractor must be approved by the employer, the opposite was not true for employer policies. This possible imbalance has been corrected in this revised third paragraph in CONS MDB.

In a new final paragraph in CONS MDB, insurances can be placed with any eligible source in the country.

Generally speaking, these changes and additions are probably unnecessary.

18.2. *Insurance for Works and Contractor's Equipment*

Bank-specific

CONS MDB changes the terms of CONS1 sub-paragraphs (b) and (d) of the sub-clause. Sub-paragraph (b) now says that the insurance payments are to be made "to the Party bearing the costs". In sub-paragraph (d), the policy must cover risks arising out of the employer's occupation of the works only "to the extent specifically required in the bidding documents of the contract".

It is noted that "bidding documents" should read "to the extent stated in the Particular Conditions".

18.4. *Insurance of Contractor's Personnel*

Not advised

The additions to the second paragraph in CONS MDB are unnecessary and repetitive. However, the Participating Banks' intention was to ensure that there is no doubt that the intention of the sub-clause is to provide the employer and the engineer with an indemnity for personal-injury type claims (provided there was no act or neglect on their part).

19.1. *Definition of Force Majeure*

Bank-specific

In CONS MDB, a) sabotage by persons other than the contractor's personnel has been added to constitute force majeure; riot, commotion, etc. by other employees of the contractor; and b) subcontractors have been removed. The first change mirrors the addition made under 17.3(b). The second change comes about because the words are unnecessary as a consequence of the definition of the contractor's personnel at 1.1.2.7.

19.2. *Notice of Force Majeure*

Bank-specific

The first paragraph of CONS MDB now restricts force majeure to events which prevent a party from performing “its substantial obligations” rather than “any of its obligations”. In the second paragraph, the phrase “such obligations” is changed to “its obligations”. These changes restrict the application of force majeure to very serious events.

Under CONS1, it did not matter what part of a party’s obligations was affected by the force majeure event. This has been tightened up in CONS MDB by the restriction introduced. Now the impact must have a substantial impact on the party’s obligations.

The meaning of “substantial” could be controversial, but since the party is prevented from performing its obligation, it has no choice but to stop performance. The precise meaning, extent and consequences of the performance that must stop will then be the subject of discussion and possibly a dispute.

19.4. *Consequences of Force Majeure*

Contractor’s position balanced

CONS MDB changes the CONS1 terms of sub-paragraph (b) so that the contractor’s entitlement to recover costs arising out of a force majeure event include “the costs of rectifying or replacing Works and /or Goods to the extent they are not indemnified through the insurance”. Thus, force majeure can only be relied on by the contractor if it is affecting his substantial obligations. The same amendment has been made here as to 19.2. Accordingly, instead of a party being prevented from performing “any of its obligations” as a consequence of the force majeure event, the party must be prevented from performing “its substantial obligations” by such an event.

19.6. *Optional Termination, Payment and Release*

Bank-specific

At CONS MDB sub-paragraph (c), for the payment as a result of force majeure, the cost or liability must be “necessarily” as well as reasonably incurred. Thus the costs incurred by the contractor in the expectation of completing the works must not only have been reasonably incurred but also have been necessarily incurred. At first sight, this is a stricter standard than in CONS1, which may exclude some of the costs which could be claimed by the contractor under CONS1. The presumed intention is to limit the contractor’s right to payment. However, this is unlikely to lead to a significant change: any expense that has been incurred necessarily will obviously be one that is reasonable.

20.1. *Contractors Claims*

Improved wording

In CONS MDB, the engineer will give his response on the principles of the claim within “such time”. The wording has been made clearer by changing “such time” to “the above defined time period”, namely the 42 days after receiving a claim.

Also, “amounts” been changed to “additional payments” in the seventh paragraph, which is possibly a more precise wording, but probably an unnecessary change.

Improved wording

CONS MDB adds a previously non-existent condition precedent for making a referral to the Dispute Board: “If the Engineer does not respond within the timeframe defined in this Clause The claim is rejected and any of the Parties may refer to the Dispute Board”.

The idea of ensuring that the engineer proceeds rapidly to agree or determine a claim is excellent. But this depends on the contractor having all the necessary substantiation. This could be achieved more simply by adding “The Engineer shall promptly proceed...”. Moreover, the contractor is always free to take the matter to the Dispute Board.

Not advised

CONS MDB Sub-clause 20.1 is not entirely clear regarding the time for appointing the DB. The first paragraph says the DB shall be appointed by “the date stated in the Contract Data”. In the space for that is in the contract data, it is printed (presumably as mandatory): “28 days after the Commencement”. However, the fourth paragraph of Sub-clause 20.2 foresees a possibility of the parties jointly appointing the DB up to “21 days before the date stated in the Contract Data”. Having in mind that such date is linked to the date of the contractor’s receipt of the letter of acceptance, it would seem clearer to link the period for joint appointment to that letter instead of the commencement date.

20.2. *Appointment of Dispute Board*

Clarification

As a result of considerable experience with Dispute Adjudication Boards, called Dispute Boards in CONS MDB, the Participating Banks and FIDIC have improved the Dispute Board (DB) selection procedures in CONS MDB:

- a) The Parties first consider together who shall serve as the DB and it is only if they have not jointly appointed the DB in 21 days before the date stated in the contract data that each party proposes a member for a three-person DB.
- b) The first two members have an obligation to recommend someone to be appointed as the third member, who will act as chair for the parties’ agreement.
- c) The provision for a list of potential members for a three-person DB to be included in the contract has been deleted. The contract data include provision for suggestions for a sole member, but this is not clear in the revised sub-clause.
- d) It has been clarified that the parties must agree on the terms of appointment of any expert whom the DB consults, as well as the remuneration.
- e) The wording for the procedure for the appointment of a replacement has been improved.

The removal of the right of the parties to refer a matter to the Dispute Board for an opinion may seem surprising, but it has been replaced by an improved provision in the second of the Procedural Rules in the Annex concerning the prevention of problems or claims from becoming disputes. Specifically, during site visits, the DB shall endeavour to prevent potential problems or claims becoming disputes.

Improved wording

“suitably qualified” now includes professional experience in the type of work.

Not advised

Some of the qualities for the DB member which are given in the Appendix have been repeated in the sub-clause.

Not advised

From the wording of the new second paragraph in Sub-clause 20.2, “The DB shall comprise, as stated in the Contract Data, either one or three suitably qualified persons (‘the members’), each of whom shall be fluent in the language for communication defined in the Contract and shall be a professional experienced in the type of construction involved in the Works and with the interpretation of contractual documents. If the number is not so stated and the Parties do not agree otherwise, the DB shall comprise three persons.”

Thus, it seems to be intended that the employer shall decide the size of the DB; viz. sub-clause 1.1.1.10 of the General Conditions. No guidance appears in CONS MDB regarding the criteria to be applied by the employer in deciding the size of the DB. Perhaps employers will be guided by CONS1, which gave the borrower the option of selecting either a one-person or a three-person board unless the estimated value of the contract, including contingencies, was in excess of USD50m., in which case the banks generally required a three-person board.

Not advised

In the contract data there is an entry for “List of potential DB sole members” and the CONS MDB guidance is: “Only when the DB is to be comprised of one sole member, list names of potential sole members; if no potential sole members are to be included, insert: ‘none’.” Unanswered is the question of whether the list of sole members is exclusive and no other candidate can be considered in pre-contract negotiations with the successful bidder, or whether the successful bidder will be able to propose other candidates.

20.3 *Failure to Agree on the Composition of the Dispute Board*

Clarification

In CONS MDB, the title of the sub-clause has been changed to reflect its content.

Paragraph (d) has been changed to provide the reference to the appointing entity if one party fails to approve a member nominated by the other party. This supposedly closes a “gap” in CONS1.

Not advised

However, Sub-clause 20.3 introduces a new provision in paragraph (b) by providing for action by the appointing entity or official if either party fails to approve in a timely fashion a nominated person to serve as member. While this is helpful to avoid wilful obstruction of the process of forming the Board, it seems potentially a way for a party to avoid considering the nominee, being free to object on reasonable grounds and request the nomination of some other person.

20.4 *Obtaining Dispute Board Decision*

Improved wording

Sub-clause 20.4 in the fifth paragraph adds a requirement not found in CONS1 regarding the notice of dissatisfaction with the DB decision. The notice given must include a statement of the intention to commence arbitration. So in CONS MDB, the provision for a notice of dissatisfaction with the DB’s decision must also refer to the party’s intention to commence arbitration. In other words, the notice

of dissatisfaction must include confirmation that the disaffected party intends to arbitrate should an amicable decision not be reached in accordance with 20.5.

20.5. *Amicable Settlement*

Improved wording

As with 20.4, the words “and intention to commence arbitration” have been added. So in CONS MDB, the provision for a notice of dissatisfaction with the DB’s decision must also refer to the party’s intention to commence arbitration.

20.6. *Arbitration*

Bank-specific

In CONS MDB, the forum for international arbitration has been changed to that stated in the Particular Conditions, with ICC arbitration remaining as the default forum. This allows the employer to decide whether to use the ICC, or a different set of rules. If no procedure is stated then the ICC rules apply.

CONS MDB also has new paragraphs that specify that:

- a) the arbitration must be administered under UNITRAL rules for foreign contractors;
- b) the venue of the arbitration is the city where the headquarters of the appointed arbitration institution are located;
- c) arbitration proceedings for local contractors are to be in accordance with the laws of the employer’s country.

So in CONS MDB there is nothing to stop the engineer or “representatives of the Parties” from giving evidence before a tribunal.

It is understandable that the Participating Banks wish to differentiate between contracts with foreign contractors from those with domestic contractors. However, generally speaking:

- a) UNCITRAL arbitration is understood to be somewhat antiquated, and ICC arbitration is to be preferred;
- b) the CONS MDB wording leaves open the possibility of *ad hoc* arbitration arrangements, so long as they are “international”.

It is understandable that the Participating Banks would prefer any arbitration to be carried out by an institution with which they have some familiarity or failing this, UNCITRAL. In addition, the changes make certain that any dispute is resolved in accordance with the law of the employer’s country.

Not advised

In the CONS MDB contract data, there is an entry for “Appointment (if not agreed) to be made by”, and the CONS MDB guidance is “Insert name of the appointment entity or official”. This wording seems wide enough to enable an employer to select any official, which could lead to abuse by an unscrupulous or ill-advised employer. Unlike CONS1, CONS MDB gives no guidance to the borrower on selection of an appropriate appointing authority or official.

20.7. *Failure to comply with Dispute Board's Decision*

Bank-specific

This sub-clause has been revised so that a failure to comply with a Dispute Board decision, which has become final and binding as in the final paragraph of Sub-clause 20.4, can be referred to arbitration, independently of whether or not a notice of dissatisfaction has been issued.

General Conditions of DB Agreement: 2 – General Provisions

Not advised

The second and fourth paragraph have been deleted. The second is deemed an unnecessary technicality. But deleting the fourth is not thought to be in the parties' interests because the DB agreement should not be assigned without their agreement.

General Conditions of DB Agreement: 4 – General Obligations of the Member

Improved wording

As one of the purposes of the site visits is to, as far as possible, "endeavour to prevent potential problems or claims becoming disputes, there is a small addition to the procedural rules.

General Conditions of DB Agreement: 8 – Default of the Member

Improved wording

A paragraph has been added so CONS MDB is not so lenient as CONS1: member's conduct does not need to have caused a decision to become ineffective before a liability to reimburse the employer and contractor arises.

General Conditions of DB Agreement: 8 – Disputes

Bank-specific

Words have been added so that the parties are free to choose their own arbitration forum and it is only in default of such a choice that the ICC rules apply.

C. The future

On the basis of this relatively subjective analysis, it is likely that some of the amendments to the standard FIDIC Construction Contract, 1st Edition 1999, that have been introduced in the MDB Harmonised Edition will be adopted when a 2nd Edition of the FIDIC Construction Contract is prepared.

Moreover, while there is some very limited scope for flexibility in using Particular Conditions, it is likely that in the future all MDB-funded projects using the MDB Harmonised Construction Contract will contain substantially or entirely the MDB Harmonised General Conditions, and parties will need to price accordingly for the revised distribution of risk.

Finally, it is clear that the implementation of the MDB Harmonised Construction Contract will increase dramatically the number of Dispute Boards. Additionally, as it seems likely that at least some of the various national bilateral aid agencies will follow the practice of the MDBs by implementing the use of DBs in

contracts which they finance. With increased use of DBs, one can hope for continuing improvements in the development of the DB technique,

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