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THE DUBIOUS UPGRADE OF INTERNATIONAL DEVELOPMENT CONTRACTS

*Gabriel Swiney**

I. INTRODUCTION

Dozens of agencies fund development projects around the world. Some agencies are the creatures of states, such as the United States Agency for International Development (USAID). Other agencies are multinational or transnational, such as the Asian Development Bank, the Inter-American Development Bank, and the World Bank. These agencies pursue development goals in a number of ways: they may promote the rule of law, give loans to government treasuries, or pay the salaries of local teachers. In addition, many development agencies fund a variety of crucial construction projects in developing countries.

Construction projects are inherently rife with pitfalls. Design flaws can surface, unforeseen conditions can cause delays, natural or man-made disasters can strike mid-project, and disputes can arise among funding agencies, local governments, and the contractors who actually perform the construction. The risky and complicated nature of these projects compels development agencies to utilize detailed contracts. These development agencies may be simultaneously funding dozens, if not hundreds, of international development contracts at any given time.

Development agencies avoid the confusion and expense of hundreds of different contracts by using model contracts. These models provide a set of basic contractual provisions—often called the “General Conditions”—that can be copied verbatim for each construction project. The general contracting parties can amend and supplement the General Conditions as needed by attaching individualized “Particular Conditions” for specific projects.¹

There are a number of advantages to using model contracts.

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¹ For example, model International Federation of Consulting Engineers (FIDIC) contracts and agreements are available at <http://www1.fidic.org/resources/contracts/> (last visited 21 Aug. 2006).

The use of standard forms is a source of contractual predictability and stability, thus reducing transaction cost for the participants. For example, a systematic approach to the tendering procedure that sets out a transparent and efficient approach for obtaining, evaluating, and selecting bidders will decrease the costs of tailor-made procedures.²

Model contracts also reduce “the cost associated with risk, one of the most significant costs. This cost reduction is especially true for risks that are impractical to insure. One aim of standard clauses is indeed to address project risks and to specify how these risks are to be managed.”³

Finally, the use of standard forms and model contracts reduces the transaction costs of contract formation itself. “Standard form contracts focus the parties’ attention on the terms that are normally open for negotiation, the transaction’s ‘basic negotiable elements,’ and allow the parties, indeed encourage them, to take the remainder for granted.”⁴ Thus, “any costs related to drafting and negotiating will consequently be reduced since the use of standard terms and conditions will avoid the need for protracted debate on detailed wording.”⁵ For these reasons, development agencies use model and standard-form contracts.

Although development agencies use model contracts, the agencies do not write them. Following the commercial construction industry’s lead, development agencies use model contracts prepared by industry associations; the most popular of these is the International Federation of Consulting Engineers (FIDIC).⁶

FIDIC provides a number of model contracts, each one targeted at a particular type of construction project. For example, the FIDIC designed one contract for use with traditional civil engineering projects, another for contractor-designed work, and yet another for

² Catherine Pédamon, *How Is Convergence Best Achieved in International Project Finance?*, 24 *FORDHAM INT’L L.J.* 1272, 1296 (2001).

³ *Id.*

⁴ *Id.* at 1297–98.

⁵ *Id.*

⁶ FIDIC: International Federation of Consulting Engineers, <http://www.fidic.org> (last visited Aug. 21, 2006).

projects on a fixed-price or turnkey basis.⁷ This Article focuses on FIDIC's traditional civil engineering construction contract, known informally as the "Red Book."

There are two versions of the Red Book.⁸ The first, published in 1987,⁹ has found widespread use in private and public construction projects throughout the world. A newer version, published in 1999,¹⁰ incorporates significant changes from the 1987 version, including changes in risk allocation and dispute resolution. Development agencies are free to use whichever version they choose.

In addition to the Red Book, in 2005 FIDIC published a contract specifically designed for use in projects funded by multilateral development banks such as the World Bank, Asian, and Inter-American Banks. The Multilateral Development Bank (MDB) contract is, in most respects, identical to the 1999 version of the Red Book.¹¹

The choice facing development agencies is clear: should they use the 1987 Red Book or switch to the 1999 and MDB versions of the model contract? This paper will attempt to answer that question. Part II of this paper will provide a brief summary of where development

⁷ Differences between the various contracts are available at http://www1.fidic.org/resources/contracts/which_contract.asp (last visited Aug. 21, 2006).

⁸ In 1987, the FIDIC issued the first version of the Red Book, "Conditions of Contract for Works of Civil Engineering Construction." In 1999, it issued the second version, entitled "Conditions of Contract for Construction." (Note that FIDIC refers to the 1999 version as the first edition. *See infra* note 10.)

⁹ FÉDÉRATION INTERNATIONALE DES INGÉNIEURS-CONSEILS (FIDIC) [INTERNATIONAL FEDERATION OF CONSULTING ENGINEERS], CONDITIONS OF CONTRACT FOR WORKS OF CIVIL ENGINEERING CONSTRUCTION (1987) [hereinafter FIDIC 1987].

¹⁰ FÉDÉRATION INTERNATIONALE DES INGÉNIEURS-CONSEILS (FIDIC) [INTERNATIONAL FEDERATION OF CONSULTING ENGINEERS], CONSTRUCTION CONTRACT: CONDITIONS OF CONTRACT FOR CONSTRUCTION (1st ed. 1999) [hereinafter FIDIC 1999].

¹¹ FÉDÉRATION INTERNATIONALE DES INGÉNIEURS-CONSEILS (FIDIC) [INTERNATIONAL FEDERATION OF CONSULTING ENGINEERS], CONDITIONS OF CONTRACT FOR CONSTRUCTION (Multi-lateral Development Bank [MDB] Harmonized ed. 2005) [hereinafter FIDIC MDB 2005]. For purposes of this paper, the 1999 Red Book and the MDB contract will be treated as equivalent. For a discussion of differences between the 1999 contract and the MDB contract, see Christopher Wade, Chairman of FIDIC Contracts Committee, Private Practice United Kingdom and Adviser, SWECO International, Sweden, The FIDIC Contract Forms and the New MDB Contract, Notes from Presentation Given at ICC-FIDIC Conference, Paris (Oct. 2005), http://www1.fidic.org/resources/contracts/wade_oct05.pdf; *see also* FIDIC, Informational Article: Harmonised Form of FIDIC Construction Contract Agreed with Multi-Lateral Development Banks, <http://www1.fidic.org/resources/mdb/> (last visited Aug. 22, 2006).

agencies currently stand regarding the choice of model contracts. Part III will compare the 1987 contract with the 1999 and MDB contracts, and Part IV will explore implications that the different contracts present as they relate to international development. Finally, Part V will offer some conclusions and recommendations for the future of international development contracts.

II. THE POSITIONS OF THE AGENCIES

Most of the major development agencies use one of the FIDIC contracts. For example, USAID policy documents promote the use of the 1987 Red Book for USAID-financed construction projects.¹² Although the choice of contract provisions ultimately rests with individual USAID field offices, USAID regulations and handbooks are all geared for use with the 1987 FIDIC.¹³

In contrast, multilateral development banks have generally adopted, or agreed to adopt, FIDIC's 2005 MDB contract, which in turn is based on FIDIC's 1999 Red Book. The following banks both participated in drafting the MDB contract and have agreed to its use:

- the African Development Bank;
- the Asian Development Bank;
- the Black Sea Trade and Development Bank;
- the Caribbean Development Bank;
- the European Bank for Reconstruction and Development;
- the Inter-American Development Bank;
- the International Bank for Reconstruction and Development (World Bank);
- the Islamic Bank for Development; and
- the Nordic Development Fund.¹⁴

¹² See generally USAID, *Chapter 2: Procurement of Construction Services*, in COUNTRY CONTRACTING HANDBOOK (2000), available at <http://www.usaid.gov/policy/ads/300/305mab.pdf>.

¹³ See USAID, *ADS 311: Local Procurement* (2000), available at <http://www.usaid.gov/policy/ads/300/311.pdf>.

¹⁴ Press Release, Enrico Vink, Managing Dir., FIDIC, Article for Information: Harmonised Edition of the FIDIC Construction Contract Agreed with the Multilateral Development Banks (Sept. 2005), available at http://www1.fidic.org/resources/contracts/cons_mdb_may05_press_release_cw_sep05.pdf.

The form of contract used by development agencies is not a trivial matter. These agencies fund construction projects that are both very costly and very important. Developing nations often depend on development aid for the construction of critical infrastructure, such as electrical and water treatment facilities. In addition, the sheer monetary value of these projects makes even small differences in contract provisions potentially very costly.

The reports of selected development agencies demonstrate the magnitude of the issue. Since its founding in 1966, the Asian Development Bank (ADB) has spent over \$55 billion on infrastructure projects.¹⁵ Infrastructure projects account for upwards of 60% of the ADB's loans, which loans totaled \$5.8 billion in 2005, not including grant monies.¹⁶ Likewise, between 1995 and 2005, the Inter-American Development Bank approved \$8.4 billion in loans for infrastructure improvements.¹⁷ The World Bank lent \$7.3 billion for infrastructure projects in 2005—one-third of its entire lending budget.¹⁸

Thus, the FIDIC contracts govern a significant percentage of foreign and multilateral aid. Indeed, it would be no exaggeration to say that FIDIC contracts dominate international development construction projects. Yet that recognition comes with a caveat: two versions of the FIDIC contract are in use.¹⁹ USAID continues to use the 1987 version and development banks continue to use the 2005 MDB version.

Was it wise for the multilateral development banks to adopt the MDB contract in 2005? Should USAID follow suit and abandon the 1987 version in favor of the 1999 or the 2005 MDB contracts? Answering those questions requires understanding the differences between the various FIDIC contracts.

III. THE COMPARISON: 1987 VERSUS 1999 AND MDB

This Article compares two versions of the *FIDIC Conditions of Contract*: the 1987 version with the 1999 and MDB versions. The comparison that follows does not cover every difference between the versions. Rather, it focuses on the most substantial differences,

¹⁵ Liqun Jin, Vice President, Asian Dev. Bank, Statement given at the FIDIC 2005 Annual Conference: Sustainability and Developing Asia, (Sept. 5, 2005).

¹⁶ ASIAN DEV. BANK, 2005 ANN. REP. 20, 33 (2005).

¹⁷ INTER-AM. DEV. BANK, 2005 ANN. REP. 23 (2005).

¹⁸ WORLD BANK, 2005 ANN. REP. 15 (2005).

¹⁹ Technically, there are three: 1987, 1999, and MDB. This paper treats the 1999 and MDB contracts as the same unless noted otherwise.

particularly those that could impact the goals of foreign development, namely increasing the number and scope of development projects, as well as growing the local capacity within these states to sustain such projects.

Before we begin, it is helpful to describe the various players in a typical development project. The *Employer* is the entity, usually a government agency in this context, that desires the infrastructure. Typically, the Employer will own the project once it is completed. The *Contractor* is the company hired to build the project. The *Engineer* is an engineering professional, hired by the Employer, to oversee the project from start to finish. The Engineer brings a level of technical expertise to the project that the Employer often lacks. As we will see, the Engineer occupies a sometimes-unclear position between the Employer and the Contractor. Finally, projects often utilize a *Financer*—an agency such as the World Bank that provides funds for the project.

A. Comparison of Clauses

1. Clause 2.4: Employer's financial arrangements

Clause 2.4 of the 1999 and MDB contracts introduces a provision that did not exist in the 1987 contract. Clause 2.4 requires the Employer to submit, within 28 days after a request from the Contractor, reasonable evidence that the Employer has the funds to pay the contract price.²⁰ In addition, if the Employer intends to make a material change to its financial arrangements, the Employer must give notice to the Contractor along with detailed particulars. If the Contractor does not receive the requested evidence, it can reduce the rate of work, suspend work, and eventually terminate the contract.²¹

2. Clause 3: The engineer

Clause 3 marks a significant difference between the 1987 contract and the 1999 and MDB contracts. Unlike the 1987 version, where engineers were required to act impartially, under the 1999 and MDB

²⁰ Peter L. Booen & Gordon L. Jaynes, *The FIDIC's 1999 Forms of Contract*, BUILDING AND CONSTRUCTION LAW (2001), available at http://www1.fidic.org/resources/contracts/booen_mar01.asp.

²¹ FIDIC 1999, *supra* note 10, at cl. 16.

versions the Engineer acts on behalf of the Employer.²² The Employer also has additional ability to control the Engineer under the 1999 and MDB contracts as compared with the 1987 version: the 1999 and MDB contracts allow the Employer to replace the Engineer, a power not given to the Employer by the 1987 contract.²³ However, the 1999 and MDB contracts include a check on the Employer's new ability: the Contractor may veto a new engineer by raising reasonable and supported objections.

In place of a neutral engineer, Clause 3 requires the Engineer to make "fair determinations" in specified circumstances.²⁴ Yet some provisions do not invoke the fair determination requirement, such as termination of contract due to *force majeure*.²⁵ The implication is that in these instances, the Engineer need not make fair determinations.²⁶

Clause 3.1 identifies the Engineer as personnel of the Employer. The result is that employers are now liable for the Engineer's actions and determinations because the Engineer is an employee of the Employer under the 1999 and MDB contracts. Under Clause 17.1, the Employer indemnifies and holds harmless the Contractor for claims arising out of negligence, willful acts, or breach of contract by the Employer or its personnel. Although the Employer gains control over the Engineer, the Employer must also accept liability for the Engineer's actions.

3. *Clause 4.1: Contractor's general obligations*

The 1999 and MDB contracts add a fitness requirement that was not present in the 1987 version. If the Contractor must design any part of the works, those parts must be "fit for the [intended] purpose;" thus, requiring the Contractor to provide some level of warranty.

²² *Id.* at cl. 3.1.

²³ *Id.* at cl. 3.4.

²⁴ *Id.* at cls. 3.5 (when invoked), 14.6 (interim payment certificates), & 14.13 (final payment certificate).

²⁵ *Id.* at cl. 19.6.

²⁶ See David Bateson, FIDIC: New 1999 Edition of the Red Book: Impartiality of the Engineer, (Aug. 2000), available at http://www1.fidic.org/resources/contracts/bateson_aug00.asp.

4. *Clause 4.12: Unforeseeable physical conditions*

The 1999 and MDB contracts include a significant change in the extent to which Contractors may claim additional payments on grounds of unforeseeable physical conditions.²⁷ Under the 1999 and MDB versions, if the Contractor makes a claim for adverse physical conditions, the Engineer may review whether other physical conditions “in similar parts of the Works (if any)” were more favorable than could reasonably have been foreseen. If the answer to this question is yes, the Engineer, acting in his adjudicatory role, may reduce the amount of extra cost claimed by the amount saved by the unforeseen favorable conditions.²⁸ Contrast the 1999 and MDB provision with the 1987 contract, which does not provide for this sort of offsetting. Under the 1987 contract, negative unforeseeable conditions merit additional costs regardless of whether unforeseeable positive conditions are present elsewhere. The change has the effect of shifting risk to the Contractor.²⁹

5. *Clause 15.5: Employer’s entitlement to termination*

Clause 15.5 of the 1999 and MDB contracts gives the Employer a power it does not have under the 1987 version: the power to terminate the contract for convenience. Under Clause 15.5, the Employer may terminate at any time for convenience, except in order to undertake the works itself or to arrange for another contractor to do so. Payment to the Contractor under these circumstances does not provide for profit—merely costs.³⁰ This clause creates the risk that the Contractor could realize no profit for the job if the Employer finds himself in a situation where termination of the project is required after the project has begun.³¹

²⁷ Booen & Jaynes, *supra* note 20.

²⁸ FIDIC 1999, *supra* note 10, at cl. 4.12.

²⁹ See EUR. INT’L CONTRACTORS (EIC), EIC CONTRACTOR’S GUIDE TO THE FIDIC “NEW RED BOOK” (rev. 2003) [hereinafter EIC].

³⁰ FIDIC 1999, *supra* note 10, at cl. 19.6; see C.R. Seppala, *FIDIC’s New Standard Forms of Contract: Force Majeure, Claims, Disputes and Other Clauses*, 2000 INT’L CONSTRUCTION L. REV., 235, pt. I(5), II (2000).

³¹ See EIC, *supra* note 29.

6. *Clause 17.3: Employer's risks*

Clause 17 allocates risk of damage to the construction works between the Contractor and the Employer.³² For the most part, the Employer's risks are the same under the 1999 and MDB contracts as they were under the 1987 contract. The Employer's risks under the 1999 and MDB contracts include losses resulting from the following:

- (a) wars and hostilities that may occur anywhere in the world;
- (b) rebellion, terrorism, and civil war, limited to the country of the works;
- (c) riot, commotion, disorder not by Contractor's personnel, limited to the country of the works;
- (d) munitions of war, explosive materials, radiation not used by the Contractor (the 1987 contract did not list munitions of war and explosive materials under employer's risks, but under the 1999 contract, this risk is limited to the country of works);
- (e) pressure waves from supersonic aircraft;
- (f) use or occupation by the Employer of works, unless specified otherwise;
- (g) design of works by the Employer or those for whom the Employer is responsible;
- (h) unforeseeable forces of nature or those against which an experienced contractor could not reasonably have been expected to take adequate preventive precautions.

If the works suffer damage due to the Employer's risks, the Contractor must rectify that damage if requested to do so by the Engineer. Clause 17 under the 1999 and MDB contracts entitles the Contractor to costs and extensions of time for this unexpected work.³³ However, it entitles the Contractor to profit for rectifying only losses caused by risks (f) and (g). This is a change from 1987, where the Contractor was entitled to profit from rectifying all of the Employer's risks.³⁴ This change increases the Contractor's risk and decreases that of the Employer.

³² See Nael G. Bunni, *Recent Developments in Construction Disputology*, 17 J. INT'L ARB. 105, 105 (2000).

³³ FIDIC 1999, *supra* note 10, at cl. 17.4.

³⁴ FIDIC 1987, *supra* note 9, at cls. 20.3 & 52.

7. Clause 17.6: Limitation of liability

The 1987 contract does not contain clauses limiting the Contractor's liability, but the 1999 and MDB versions do. Clause 17.6 excludes the Contractor's (and the Employer's) liability for, among other things, loss of use of the construction works, loss of profit, loss of any contract, and indirect or consequential damage which may be suffered by the other party. The same clause also places a monetary limit on the Contractor's total liability, unless stated otherwise in the contract. Clause 17.6 does not limit liability in cases of fraud, deliberate default, or reckless misconduct.

8. Clause 19: Force majeure

Clause 19 of the 1999 and MDB contracts introduces the concept of *force majeure*.³⁵ "*Force majeure*" replaces "special risks" in Clause 65 of the 1987 contract.³⁶ *Force majeure* is defined as exceptional events or circumstances that are (a) beyond a Party's control, (b) could not reasonably be provided against before entering into the contract, (c) having arisen, could not reasonably be avoided or overcome, and (d) are not substantially attributable to the other party.³⁷ Clause 19.1 provides a non-exhaustive list, including events such as war, hostilities, terrorism, riots, and natural disasters.

The 1999 and MDB "*force majeure*" language is broader than the 1987 "special risks" language. Under the 1987 contract, the only open-ended language referred to natural disasters; otherwise, the list of special risks was exhaustive. Under the 1999 and MDB contracts, the definition of *force majeure* is entirely open-ended. An unimagined, but human-caused event would be covered if it met the criteria of 19.1. In this instance, the 1999 and MDB contracts give more risk to the Employer than does the 1987 version by encompassing a greater universe of events for which the Employer is essentially liable.

If events of *force majeure* occur, they allow the Contractor to obtain extensions of time and incur additional costs.³⁸

³⁵ Seppala, *supra* note 30, at pt. I(4).

³⁶ See Bunni, *supra* note 32 (criticizing the use of *force majeure* in lieu of special risks).

³⁷ FIDIC 1999, *supra* note 10, at cl. 19.1.

³⁸ *Id.* at cl. 19.4.

9. *Clause 20: Claims, disputes, and arbitration*

The 1999 contract sets out an entirely new dispute resolution scheme. Under the 1987 contract, dispute resolution progressed according to article 67:

Engineer's Decision → Amicable Settlement → Arbitration.

Clause 20 of the 1999 and MDB contracts provide instead for:

Engineer's Decision → Dispute Adjudication Board → Amicable Settlement → Arbitration.

At first glance, this change in process seems insignificant, yet the Dispute Adjudication Board (Dispute Board) system is robust. Under 1999 and MDB Clause 20.2, the Dispute Board is to be formed in advance of actual disputes.³⁹ It begins meeting when a dispute arises, and makes decisions according to a set of rules and procedures laid out in Clauses 20.2 through 20.5. The Dispute Board is made up of either one or three members, as specified in an appendix attached to the tender documents. The Dispute Board's decisions are final, unless a party to the dispute gives notice of dissatisfaction within twenty-eight days. Regardless, Dispute Board decisions are immediately binding. Arbitration is possible only after going through the Dispute Board process, and even then only if a party has filed a timely notice of dissatisfaction with the Dispute Board's decision.⁴⁰

B. Summary of the Comparison

The two FIDIC contracts differ most obviously at the organizational level. The 1999 and MDB contracts categorize the seventy-two provisions found in the 1987 contract and arrange them into twenty clauses. Such modifications are essentially cosmetic; the number of actual provisions is about the same between the versions.

³⁹ See Seppala, *supra* note 30, at pt. II (discussing the difference between standing and ad hoc DABs).

⁴⁰ FIDIC 1999, *supra* note 10, at cl. 20.4.

Yet it would be a mistake to view the 1999 and MDB contracts as merely a reworking of the 1987 contract.⁴¹ While the 1999 and MDB contracts do contain some refinements to the 1987 version, they also contain substantive alterations that affect the way the contract functions.

Changes in risk allocation are difficult to summarize. Compared to the 1987 contract, the 1999 and MDB versions shift some risks to the Contractor and other risks to the Employer. Without consulting actuarial data regarding particular projects in specific locations, it is meaningless to weigh these risks against each other in the hope of deciding whether the 1999 and MDB contracts transfer greater risk to one party or the other. What can be said is that none of the three contracts are unbalanced. Each assigns risk in a logical way, and all seem to provide a workable contractual framework.

Changes in the dispute resolution mechanisms are fairly straightforward; however, it is useful to consider the role of the Engineer and the dispute settlement provisions together. Having given up on the idea of an impartial engineer, the FIDIC felt the need to insert another stage into the dispute settlement process: the Dispute Board. Practically speaking, the Dispute Board sits somewhere between amicable settlement and arbitration, providing a decision-making body that allows parties to continue performance of the contract even during a dispute over the contract's content or requirements.⁴²

In light of these changes, parties to foreign aid contracts must decide which set of contract provisions they prefer: those under the 1987 version or those under the 1999 and MDB versions. The question then becomes which contract is better for development.

IV. IMPLICATIONS FOR FOREIGN DEVELOPMENT

The differences between the various FIDIC contracts are significant in two ways. First, the differences demonstrate the evolving nature of international finance contracts. More importantly, the differences have real-world implications for the practice of foreign development. Contractual provisions can promote or deter

⁴¹ At least one of the drafters of the 1999 FIDIC contract agrees. Christopher Wade, *FIDIC's Standard Forms of Contract: Principles and Scope of the Four New Books*, 2001 INT'L CONSTRUCTION L. REV 5, (2001).

⁴² See EIC, *supra* note 29 (discussing the relationship between an impartial engineer and the DAB).

development, and they can reduce or increase the costs of development projects. Given the size and importance of development construction projects, the implications of relevant contractual provisions deserve scrutiny.

Some of the differences between the 1987 FIDIC contract and the 1999 and MDB contracts will have little impact on development projects. These changes will be discussed in part A below. However, other changes have potentially wide reaching implications that will affect development in both positive and negative ways. Some of these changes will be discussed in part B below.

A. Minor and Benign Changes

Generally, it is inaccurate to think of the 1999 and MDB contracts as updated versions of the 1987 contract because the differences between the contract versions are simply too great. However, some differences can be viewed as mere updates, beneficial changes, or neutral modifications that do not have major implications for the utility of the contract as a whole.

One example of a benign change is Clause 2.4 of the 1999 and MDB contracts. The requirement in Clause 2.4 that the Employer prove it has the ability to pay for the contract should not cause significant problems for international development projects. Development agencies, after all, should easily be able to demonstrate that they have sufficient funds to complete their obligations under a given contract. If the development agency cannot come up with such proof, then it seems there is nothing wrong with giving the Contractor the right to back out of the contract. In reality, ensuring that a perspective party to a contract has adequate funding is a basic practice. Clause 2.4 will likely forestall disputes and reduce contractors' risks, which in turn, would allow contractors to perform construction projects at lower costs. Clause 2.4 is thus a minor, but welcome innovation to be viewed as the solidification of an already common practice.

Another minor change, and welcome addition, is seen in Clause 4.1 of the 1999 and MDB contracts. Clause 4.1 introduces a fitness requirement for contractor-designed portions of the contract. The rationale here is that the Contractor is in a better position than the Employer to reduce the risk that the Contractor's designs are unfit; thus, it is efficient to require the Contractor's designs to be "fit for the

purpose” that they were intended.⁴³ Again, a small change to contract provisions works to reduce the cost of contracting and thus promotes foreign development.

Clause 17.6 also marks a minor change for the better. By placing limits on the Contractor’s liability—such as by excluding loss of use of the works and loss of the Employer’s profits—the 1999 and MDB contracts reduce the Contractor’s risks. Facing less risk, a rational contractor can work for lower payments; thus, development projects are easier for development agencies to afford.

Clause 19 has a similar effect. The 1999 and MDB contracts adopt the concept of “*force majeure*,” as opposed to “special risks,” the language used in the 1987 contract. In so doing, the 1999 contract expands the Employer’s risks by covering unforeseeable human and natural events; the 1987 clause covered unforeseeable natural events, but only certain specified human events.

This expansion in the Employer’s liability is welcome. *Force majeure* risks—those risks that neither party can adequately prepare for—should be borne by the Employer. The Employer alone knows how valuable the project will prove to be and can thus determine, once a *force majeure* event has actually occurred, how much the Employer is willing to pay to recover from the unforeseen event. Contractors have no such ability because they must price contracts in advance of performance. If contractors bore the risk of *force majeure* events, they would be obliged to include significant “padding” into their contract prices to cover those risks. The result would be increasingly expensive contracts—and thus fewer development projects overall.

Several other differences between the 1987 contract and the 1999 and MDB contracts can be viewed in the same light.⁴⁴ Viewed at best

⁴³ FIDIC 1999, *supra* note 10, at cl. 4.1.

⁴⁴ A good example of this is Clause 13.7’s treatment of changes in legislation and Clause 17.1’s indemnity provisions. Clause 13.7 of the 1999 and MDB contracts provides the Contractor with almost the same protection against changes in legislation as did Clause 70.2 of 1987. Two changes have been made: first, the “28 days prior to the latest date for submission” timing criterion of 1987 has been replaced with a simple reference to the base date of the contract; second, the 1999 and MDB versions expand the coverage of this provision to include changes in law arising from new judicial or governmental interpretations of existing laws, not only new laws and regulations themselves as under the 1987 contract.

As for indemnities, the 1999 version requires the Contractor to indemnify the Employer for most of the same things required by 1987 version. One change has been made: under the 1999 and MDB versions, the Contractor is only liable for property damage (other than to the works) that arise out of (1) the Contractor’s design and execution of the works or (2) negligence or willful act or breach by the Contractor. 17.1.a.ii. Contrast this with Clause 22.1 of the 1987 contract, which provides for

as updates or improvements to existing provisions, these changes are benign. Such changes may individually have only minor implications for foreign development contracts. However, these minor changes are desirable insofar as they encourage foreign development.

B. The Engineer and the Dispute Board: A Major Change

Changes to the role of the Engineer and to dispute resolution procedures are not minor. On the contrary, the magnitude of the differences between the 1987 contract and the 1999 and MDB contracts in these areas can hardly be overstated. Where the 1987 contract calls for an impartial engineer, the 1999 and MDB contracts consider the Engineer to be an agent of the Employer.⁴⁵ Where the 1987 contract calls for informal mediation, the 1999 and MDB contracts call for formal adjudication. These large changes have equally sizeable implications for foreign development projects.

At first glance, Clause 3's adoption of a partial engineer seems undesirable. The Project Engineer is the liaison between the Employer and the Contractor, tasked with translating the sterile details of a contract into actual performance on the ground. The Engineer also plays a role in dispute resolution, examining disputes before they proceed to more formal means of dispute settlement. It seems appropriate that such a crucial intermediary as the Engineer be impartial.

Yet it is not at all clear that project engineers are ever truly impartial. Development professionals have suggested that engineers are quite cognizant of who pays the bills for development projects.⁴⁶ Though under the 1987 contract engineers may be formally impartial, they may work closely with, and in effect take orders from the Employer. Against this backdrop, the provisions of the 1999 and MDB contracts make more sense. If engineers are never truly impartial, then

Contractor liability regardless of fault. Thus, the 1999 contract reduces the Contractor's risk as compared with the 1987 contract.

The MDB contract differs from the 1999 contract regarding indemnities. Clause 17.1(b) of the MDB contract remains truer to the 1987 version than does the 1999 contract. The MDB version holds the Contractor liable for damages, regardless of the Contractor's negligence or fault, unless the Employer's own negligence or intentional acts caused the damage. In this instance, the MDB contract places greater risk on the Contractor than does the 1999 contract.

⁴⁵ For a discussion of differing treatment of the role of the Engineer in the FIDIC contracts, see Bateson, *supra* note 26.

⁴⁶ These development professionals are Project Engineers who, on condition of anonymity, spoke with the Author during several informal discussions.

it makes sense to contract around that fact—to recognize their partiality and deal with it.

By making the Engineer's relationship with the Employer explicit, the 1999 and MDB contracts clarify the relationships between the relevant actors. The new provisions no longer place the Engineer in the difficult, and perhaps unsustainable, position of being "neutral." This change allows the parties, as well as the Engineer, to proceed with greater clarity than they could under the 1987 contract. This should result in a smoother and more efficient interaction between the parties involved, leading to a reduction in overall costs.

However, it was not possible to merely abandon the neutrality of the Engineer. Under the 1987 contract, the Engineer had an important dispute resolution role to play: he or she functioned as a "quasi-arbitrator," deciding disputes before they proceeded to arbitration or adjudication.⁴⁷ If the Engineer is not neutral, that dispute resolution role becomes awkward to say the least.

Concerns about the neutrality of the Engineer prompted FIDIC to look for alternative-dispute-resolution mechanisms.⁴⁸ The solution FIDIC settled on was the Dispute Adjudication Board, a dispute mechanism inserted into the dispute process that can realistically claim neutrality.⁴⁹ The changes to the position of the Engineer and to dispute resolution are thus closely related. It is crucial to view development contracts holistically. The non-neutral Engineer and the Dispute Board must be viewed as a package.

The Dispute Adjudication Board functions as a bridge between the two poles of dispute resolution procedures: on the one hand cheap, quick, and informal, but potentially biased dispute resolution by the Engineer; on the other, expensive, slow, formal, and neutral procedures such as binding arbitration and adjudication by courts. The Dispute Board occupies the middle ground. The Board is neutral and uses established procedures for investigation and decision-making. Yet, it is quicker and more flexible than arbitration or adjudication. The Board is a critical part of the 1999 and MDB contracts, although there are implications for development.

To understand the impact of the Dispute Board, it is first necessary to understand where the idea of dispute boards originated. FIDIC

⁴⁷ Bunni, *supra* note 32 at 105.

⁴⁸ *See id.* at 107.

⁴⁹ FIDIC 1999, *supra* note 10, at cl. 20; FIDIC MDB 2005, *supra* note 11, at cl. 20.

certainly did not invent the concept.⁵⁰ In fact, Dispute Boards—confusingly sometimes called Dispute *Adjudication* Boards and sometimes Dispute *Resolution* Boards—have a long pedigree within the construction industry.⁵¹ Dr. Nael Bunni has tracked the popularity of dispute boards in the years leading up to their introduction in the FIDIC contract.⁵² Bunni has found that in 1988, dispute boards settled only sixteen construction disputes. By 1999, that number had risen to 758, a 47-fold increase in just over ten years.⁵³ The dollar value of contracts that include a Dispute Board provision had similarly increased from \$1.4 billion in 1988 to \$32.6 billion in 1999.⁵⁴

Dispute Boards became particularly popular outside of the United States. In England, Dispute Adjudication Boards are now mandatory for construction contracts.⁵⁵ The World Bank also introduced dispute boards into its development projects, an innovation that served as the model upon which FIDIC Dispute Boards were ultimately based.⁵⁶

Dispute boards have a number of advantages over other dispute-resolution systems. One particularly useful effect of the Dispute Board system is “effectively to prevent disputes and to assist the Parties in solving them as soon as [the disputes] appear.”⁵⁷ Resolution is accomplished more quickly because the Dispute Boards are formed at the very beginning of contract performance. The boards are thus in place before any disputes arise, and can help parties reach solutions before problems get out of hand.⁵⁸

⁵⁰ For a discussion of developments in FIDIC dispute resolution, see Bunni, *supra* note 32.

⁵¹ Briefing, Freshfields Bruckhaus Deringer, Dispute Review Boards, (May 2006), available at <http://www.freshfields.com/publications/pdfs/2006/15119.pdf>.

⁵² Bunni, *supra* note 32.

⁵³ *Id.* at 112.

⁵⁴ *Id.*

⁵⁵ Loukas A. Mistelis, *ADR in England and Wales*, 12 AM. REV. INT’L ARB. 167, 204 (2001).

⁵⁶ Bunni, *supra* note 32 at 105, 107. However, note that the World Bank’s Dispute Resolution Board before the Bank’s adoption of the MDB contract functioned differently from the Dispute Board ultimately adopted by FIDIC. Most important, the FIDIC Board’s decisions are immediately binding on parties, while Board decisions under the old Bank contracts were binding only if neither party objected. *Id.*

⁵⁷ Pierre M. Genton, *The DRB/DAB: An Attractive Procedure if One Takes Certain Precautions*, 4 FOUNDATION FORUM, Issue 2 (2000).

⁵⁸ Pierre Genton labels this an “ongoing dispute resolution role” of the Dispute Board. He argues that dispute boards can be quite effective in managing “informal disputes,” disputes that have yet to progress to the stage where parties make formal claims against each other. *Id.*

Once a formal dispute has arisen, dispute boards are useful because they provide quick and binding decisions. Parties may object to the Dispute Board's decisions, and pursue further adjudication; however, the Dispute Board's decision remains binding throughout this process. The binding nature of Board decisions allows parties to move forward with performance of the contract, even while pursuing adjudication of disputes.⁵⁹

Finally, dispute boards are useful in situations "where recourse to local courts is undesirable."⁶⁰ Perhaps local courts are seen as inefficient, expensive, corrupt, or biased; in such a case, dispute boards offer a binding alternative, significantly reducing the need for local courts' involvement in the dispute process.

Dispute boards reduce and manage conflict, allow performance to continue despite disputes, and minimize recourse to local courts. To be fair, these benefits are partially offset by additional costs. The addition of an extra layer of dispute procedures potentially increases the costs and time associated with dispute resolution. For example, Board members must be paid, and Board investigations could disrupt the construction process. Nevertheless, the benefits associated with the use of dispute boards outweigh the costs. By providing a flexible but robust dispute-resolution mechanism, the board system should allow construction contracts to proceed more smoothly and efficiently than was possible without dispute boards. Dispute boards provide a relatively fast and inexpensive alternative to the more cumbersome formal adjudication procedures.

Viewed as a single set of reforms, the changes to the status of the Engineer and to dispute-resolution provisions mark a significant advancement in development contracts. When it comes to these issues, the 1999 and MDB contracts are superior to the 1987 contract for development purposes.

*C. Unforeseeable Physical Conditions:
A Questionable Shift in Risk*

Not all changes between the FIDIC contracts are so welcome. The 1999 and MDB contracts treat unforeseeable physical conditions quite differently than does the 1987 contract. On balance, this change is counter-productive.

⁵⁹ Mistelis, *supra* note 55, at 204 (terming board decisions "binding, but not necessarily final").

⁶⁰ Genton, *supra* note 57.

Under the 1987 contract, a contractor that encountered unforeseeable conditions—for example, large rocks hidden under the soil—was entitled to additional costs and extensions of time from the Employer. The same holds true for 1999 and MDB version, but with a crucial difference: the Engineer can now offset extra costs and time if he or she finds unforeseeable beneficial conditions elsewhere in the project site.⁶¹

The effect of this change is to shift risk from the Employer to the Contractor. Under the 1987 contract, the Employer bore the risk of all unforeseen conditions. Yet under the 1999 and MDB contracts, the Employer bears only the risk of unforeseen negative conditions that are not offset by unforeseen positive conditions. Contractors will get fewer extensions of time and fewer additional costs under these new provisions.

At first glance, the change seems desirable. In principle, contractors should not be awarded additional costs and time if, on balance, other parts of the project turn out to be easier, faster, or cheaper than expected. It seems only fair that beneficial and detrimental conditions should be considered together.

However, that which is equitable is not always efficient. By shifting risk to the Contractor, the 1999 and MDB contracts could cause contractors to demand unnecessarily high prices. This, in turn, would reduce the number and scope of development projects development agencies can afford.

In order to understand this problem, it helps to consider the reasons for including an unforeseen conditions provision in the first place. For example, consider a contract that did not include an unforeseen-conditions provision where a contractor has agreed to excavate a foundation for some specified amount of money and in a certain number of days. An experienced contractor will know, in advance, that unforeseeable conditions could delay progress or increase expenses. The Contractor will thus increase the price he or she charges in an attempt to cover that possibility. The question remains—how much should the Contractor “pad” the price? These risks are, by definition, unforeseeable. The Contractor is thus forced to overestimate the danger of unforeseen risks, lest he or she be left with an unprofitable job.

Contrast that situation with a contract containing an unforeseeable-conditions clause. Under this type of contract, the Contractor is able to

⁶¹ FIDIC 1999, *supra* note 10, at cl. 4.12; FIDIC MDB 2005, *supra* note 11, at cl. 4.12.

quote a price that covers the cost of the job and no more, without worrying about unforeseeable conditions. If unforeseeable conditions do arise, the contract price can be increased appropriately.

An unforeseeable-conditions clause results in cheaper contracts for two reasons. First, the clause removes the need for contractors to pad their contract prices.⁶² For projects that do not encounter unforeseeable conditions, this will result in lower costs. Second, the clause changes the time at which costs of unforeseeable events are to be calculated. Without the clause, these costs must be estimated—or more accurately, guessed—in advance. In such a situation, overestimating the cost is likely. With the clause, the costs can be tailored to the actual conditions encountered; there is no need for overestimating risk.⁶³ Unforeseeable-conditions clauses thus minimize the costs of construction projects whether or not unforeseen conditions actually arise.

Thus, it becomes clear that an unforeseeable-conditions clause should be included in international development contracts. But what is wrong with the 1999 and MDB provisions? Clause 4.12 provides for additional costs and extensions of time, as long as they are not offset by unforeseeable positive conditions. One might argue that the balancing of positive and negative unforeseeable conditions is a superior way to allocate risk because it avoids giving extra costs and extensions of time to the Contractor when they are not actually needed.

This argument is mistaken. By introducing the concept of conditions-balancing, the 1999 and MDB contracts have given contractors a reason to once again pad their prices.⁶⁴ The problem is risk: contractors cannot be certain that engineers (and dispute boards, etc.) will correctly weigh unforeseen positive and negative conditions.⁶⁵ There is a danger that engineers will consider an

⁶² Hazel Glenn Beh, *Allocating the Risk of the Unforeseen, Subsurface and Latent Conditions in Construction Contracts: Is There Room for the Common Law?*, 46 KAN. L. REV. 115, 133 (1997).

⁶³ Thomas C. Galligan, Jr., *Extra Work in Construction Cases: Restitution, Relationship, and Revision*, 63 TUL. L. REV. 799, 813 n. 65 (1989).

⁶⁴ It is difficult to prove this assertion. Contractors who bid for projects will not be willing to admit that they are padding their prices, but it is rational for them to do so for the reasons given. As with much of contract law, the goal should be to design away these temptations, even if the danger is only theoretical.

⁶⁵ Other dangers of risk shifting exist. “[M]erely transferring risks blindly from the Employer to the Contractor will not necessarily better ensure that the works are done on time or at the agreed price. Instead, this may, at best, cause more claims and disputes and, at worst, bankrupt the Contractor, thereby requiring the Employer to re-

unforeseen to condition to be offset by an unforeseeable positive condition when in fact it is not; rational contractors will respond to that possibility by padding their prices. Therefore, a major purpose of unforeseeable-conditions clauses is undermined.

There is another problem with Clause 4.12. No matter how equitable or fair the clause is, it increases the likelihood of disputes because contractors are likely to view findings of beneficial conditions with hostility. The clause makes an already difficult determination even more complex⁶⁶ by providing parties with one more thing to argue about. It is not a minor point: disputes about whether or not unforeseen conditions are offset by other unforeseen conditions could be costly to resolve and almost impossible to settle.

It was a mistake to change the unforeseeable-conditions clause. The 1999 and MDB provisions on unforeseeable conditions are likely to increase the cost of contracting and lead to protracted disputes, thus making international development projects more difficult to fund and complete. Therefore, the 1987 provisions are preferable on this issue.

D. The Risk of Realizing No Profits

FIDIC made another change for the worse when dealing with contractors' profits. In two key situations, the 1999 and MDB contracts reduce or eliminate the ability of contractors to profit from their work. The risk of an unprofitable job is a serious deterrent to any contractor, and it has major consequences for international development.

Ultimately, the profit clauses are counterproductive; they impair, not promote, international development. The clauses at issue are 15.5 and 17.3. Clause 15.5 sets out the Employer's entitlement to termination. If the Employer exercises that right, and terminates the contract before it has been completed, the Employer need only pay the Contractor costs, not profit. Even if the Contractor has completed ninety-nine percent of the contract, the Employer's right to termination destroys the Contractor's ability to profit from the job. The best he or she can do is break even.

bid the job and, almost inevitably, pay a higher price to get the work done." C.R. Seppala, *FIDIC's New Standard Forms of Construction Contract: an Introduction* (2000), <http://www1.fidic.org/resources/contracts/seppala.asp>.

⁶⁶ This information was obtained during informal discussions between the Author and several Development Project Engineers who later asked that their remarks remain anonymous. These Engineers indicated that awards of additional cost and time extensions are judgment calls at best.

A similar result is reached under Clause 17.3, which sets out “Employer’s Risks.” If there are events and circumstances that may harm the project, the resulting damage must be paid for by the Employer, not the Contractor. Clause 17.3 includes such things as war, natural disasters, and riots. The problem with this clause is not the risk allocation itself; it is how damage to the project is to be rectified. Clause 17.4 requires the Contractor to rectify damage to the project that results from the Employer’s risks. The Contractor is entitled to extra payments covering his or her additional costs in this situation, but not any additional profits.⁶⁷ If a hurricane destroys a project one week before completion, the Contractor would have to rebuild the entire project—often a task of years, given the size of development projects—but will receive no additional profits to compensate for the opportunity cost the Contractor has incurred. This clause is particularly harmful given the great amount of profit a contractor could potentially lose due to the increased time needed to complete a project.

These provisions are not typical in construction contracts. The lack of profit in the event of employer’s termination is particularly extraordinary. Discussing contracts with the United States Government, one commentator writes, “In virtually every case, the termination for convenience clause entitles the Contractor to recover costs incurred, *profit on work done*, and costs of preparing the termination proposal no matter what type of contract it executed with the Government.”⁶⁸ Even the U.S. Court of Appeals for the Federal Circuit held that contractors are entitled to “costs incurred, profit on work done and the costs of preparing the termination settlement proposal” when a contract has been terminated for the convenience of the Employer.⁶⁹ Regulations promulgated by the U.S. Government recognize that entitlement, stating that “[a] settlement should compensate the Contractor fairly for the work done and the preparations made for the terminated portions of the contract, including a reasonable allowance for profit.”⁷⁰

⁶⁷ *But see* FIDIC 1999, *supra* note 10, at cl. 17.4; FIDIC MDB 2005, *supra* note 11, at cl. 17.4 (stating that the Contractor is entitled to extra profits when the risks are the fault of the Employer or agents thereof).

⁶⁸ Graeme S. Henderson, *Terminations for Convenience and the Termination Costs Clause*, 53 A.F. L. REV. 103, 104 (2002) (emphasis added).

⁶⁹ *Maxima Corp. v. United States*, 847 F.2d 1549, 1552 (Fed. Cir. 1988).

⁷⁰ 48 C.F.R. § 49.201(a) (2005) (discussing termination for convenience in fixed-cost contracts). “The FAR is the primary regulation for use by all Federal Executive agencies in their acquisition of supplies and services with appropriated

As for the question of profit on rectifying damage caused by employers' risks, "courts are often willing to award contractor profits for extra work, even when not provided by the contract."⁷¹ The 1999 and MDB contracts, however, do not allow contractors to claim profits in either of these two instances. That marks a significant change from the 1987 contract, which allowed profit both in the event of termination for convenience and for rectifying damage. Under the 1999 and MDB contracts, a contractor's ability to make a profit is at the mercy of both the employers, and fate.

This is bad policy. First, the risk that a contractor could be left with no profits might induce some contractors to—dishonestly—overprice their "costs" in order to guarantee that they will walk away from a job with money in their pockets. As for employers, their ability to determine whether contractors will receive profits can work as a bludgeon, allowing opportunistic employers to take advantage of a contractor's weak position.⁷² These clauses bring out the worst in contractors and employers.

The problems go beyond dishonest or opportunistic parties. Even if everyone involved acts in good faith, the danger of realizing no profits will retard the goals of international development. The key is the notion of profit, and how it means different things to different types of contractors. For example, consider a water infrastructure project in a developing country, funded by a multilateral development bank. Some projects will be of such a size that local contractors have the capacity to do the job; however, other projects will be too large, and only foreign construction firms will suffice. From time to time, both local and foreign contractors will be interested in a job, and it is here that profit becomes most important.

For a multinational construction corporation, the risk of realizing no profits is just one more risk to factor into the contract price. Furthermore, that risk can be spread out across numerous construction projects around the world, effectively diversifying the company's risk portfolio. Most importantly, the achievement of profit has little or nothing to do with the salaries received by the corporation's decision makers. They receive a salary, which is then factored into the "cost" portion of the contract itself. Their personal income is only indirectly, if at all, tied to the profits of an individual contract.

funds." U.S. GEN. SERVS. ADMIN., REGULATORY REFERENCE OVERVIEW, <http://www.gsa.gov/Portal/gsa/ep/channelView.do?pageTypeId=8199&channelId=-13342> (last visited April 24, 2007).

⁷¹ Thomas C. Galligan, Jr., *supra* note 63, at 840.

⁷² *See id.*

Contrast that example with a smaller, privately held construction company, likely operating in only one country. The small company can price the risk of no profits into its contract price, but it cannot diversify that risk to anywhere near the same extent as can a large company. That fact alone is likely to make a small contractor more risk averse than a large contractor, yet it gets worse. For a privately or closely held company, profits are often directly tied to the income of decision-makers in the company. Indeed, for a private company, the owner may not even receive a salary; the profits and the owner's take-home pay may be one and the same.⁷³

To put it bluntly, if a large corporation receives no profits, its shareholders receive no dividends. If a small company receives no profits, its owner may not be able to buy food. Since profit means different things to different types of contractors, the risk of realizing no profits has a differential impact as well. The risk of no profits will serve to weed out small, local contractors. The water treatment plant still gets built, but not by locals. That result is bad for development. With a development project, building the infrastructure is just part of the goal: the development of local capacity is also crucial to the long-term growth of developing states.⁷⁴ The 1999 and MDB contracts' shortsightedness ignores the need to promote local contractors, which is bad for development.⁷⁵

Clauses 15.5 and 17.3 are large steps in the wrong direction. Compared to the 1987 contract, the 1999 and MDB version treats

⁷³ Glenn Beh, *supra* note 62, at 152 n.160 (making a similar but more technical argument).

⁷⁴ For that matter, the same could be said for developed states. Gene Ming Lee, *A Case for Fairness in Public Works Contracting*, 65 *FORDHAM L. REV.* 1075, 1091 (1996) ("Government construction serves many purposes [besides providing infrastructure]. . . . Spending on public works also provides a stimulus to the local economy through the creation of jobs").

⁷⁵ There may be other reasons to maintain a large pool of potential contractors as well. See Glenn Beh, *supra* note 62, at 135–36. ("A large owner, especially the federal government, may have an interest in protecting and maintaining a financially healthy pool of qualified bidders for its projects and find this desirable even though it increases its own costs. After all, these large owners conduct business through bidding and each needs a pool of bidders in order to ensure competition. Additionally, the large owner may require extremely specialized work that only a small group of contractors can perform. One very costly job may drive a contractor out of business, eventually hurting the large owner who requires specialized services in multiple contracts. . . . Moreover, contractors may elect not to bid on high-risk projects, finding the risks unacceptably high. In the long run, a reluctance to compete among qualified bidders injures the large owner.")

profit in a way that is unfair, costly, discriminatory in impact, and counter-productive.

V. CONCLUSION AND RECOMMENDATIONS

Not all the differences between the 1987 contract and the more recent 1999 and MDB versions are so undesirable. As we have seen, some changes are advantageous. Some of these improvements are minor, but others are revolutionary: the adoption of a Dispute Adjudication Board is a particularly welcome development.

Nonetheless, it is not at all clear that development agencies should adopt the more recent versions of the FIDIC contract. Construction projects funded by development agencies form a crucial part of some countries' infrastructure. Tinkering with the contracts that govern those projects should only happen when necessary, and only if done with great care.

Neither the 1999 contract nor the 2005 contract written by the development banks should be used for development projects. These contracts are likely to result in costlier projects, reduction in competition, and disadvantages to those who need development aid most. However, it is not necessary to abandon the 1999 and MDB contracts entirely because their improvements, especially the creation of a dispute board, can and should be incorporated into development contracts on a piecemeal basis.

An even better solution would be the creation of a 2007 standard form contract similar in style and form to the 1999 and 2005 contracts. It should retain the positive changes as outlined in this paper and incorporate the unenforceable conditions clause found in the original 1987 standard. Likewise, Clauses 15.5 and 17.3 should be removed.

The decision by development agencies to update their construction contracts is laudable. Development projects should be governed by the most effective contract provisions available, and innovations in the law should be embraced, but change is not always desirable. In international development contracts, the touchstone must always be development: if a contract does not promote development, it is counterproductive. Such is the case with the new FIDIC contracts.

