

THE NEW FIDIC SUITE 2017: SIGNIFICANT DEVELOPMENTS AND KEY CHANGES

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INTRODUCTION

It has been almost a year since the launch of the second edition of the FIDIC Suite of Contracts (“2017 Edition”). In a previous article published in the ICLR,⁶ we commented on the proposed changes introduced by the pre-released version of the new Yellow Book (“Test Edition”) and the debate that ensued throughout 2017 over some of those proposed amendments which had raised significant concerns amongst, in particular, Contractors’ organisations.

It would seem that the release at the end of 2016 of the Test Edition was a fruitful exercise as some of the comments and criticisms made in 2017 led to quite a few changes in the final version of the 2017 Edition of the YB (“2017 YB”) that was released (together with the 2017 Edition of the Red Book (“2017 RB”) and the Silver Book (“2017 SB”)) during the International Contract Users’ Conference in December 2017.

Are those changes enough to address the original concerns raised in respect of the Test Edition and ensure the 2017 Edition be used in practice? In the predecessor to this article, we commented cautiously that only time would tell us how popular the 2017 Edition will be, and it did not in fact take too long for us to see some projects being tendered on the basis of the 2017 Edition, particularly the editions of the 2017 YB and SB. With its emphasis on contract management, the 2017 Edition creates a higher administrative burden which will require additional resources for all Parties involved – Employer, Engineer and Contractor – to properly administer those contracts. There is no doubt that the complexity and the length of some of the new clauses implementing this approach (which result in a much longer contract) will be met with resistance from some traditional FIDIC users.

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⁵ The views expressed herein are entirely those of the authors and not necessarily those of the firm or organisation with which they are affiliated.

⁶ Gillion and Cottrell, “New Yellow Book (2017): A case of when more (words) mean less (clarity)?”, [2017] ICLR 349–374. For the benefit of readers who have not yet had the opportunity to read the previous article, a number of relevant provisions are repeated in this article.

However, the original concern that the risk allocation may have somewhat changed has been addressed in the 2017 Edition with the result that the overall risk profile of each book of the 2017 Edition – which has made the 1999 FIDIC Suite so popular – remain largely unchanged (as explained in Part I of this article). As for the emphasis on contract management (described in Part II of this article), the new features introduced by the 2017 Edition reflect a trend which predominantly aims at minimising the frequency and number of issues that may potentially result in disputes. In this regard, the new contract management features of the 2017 Edition make for, in our view, a welcome change, even though the complexity in the drafting of some of these provisions has increased, which reduces the user-friendliness of the 2017 Edition.

Other key changes in the 2017 Edition relate to the claims and disputes procedures (Part III of this article), which include enhanced dispute avoidance features, in an effort to encourage the contemporaneous resolution of issues between the Parties and again avoid comprehensive disputes at the end of a project.

PART I: RISK ALLOCATION UNDER THE 2017 EDITION – LARGELY UNCHANGED

The 2017 Edition largely shares the same risk allocation as the 1999 Edition.

Of particular significance in the Test Edition was the increased assumption of risk by the Contractor (i.e. of all other risks other than the Employer's risks) and the new (uncapped and unlimited) indemnity as to fitness for purpose introduced by sub-clause 17.7 (*Contractor's Indemnities*).

Fortunately, FIDIC has listened to the concerns expressed by Contractor organisations. The fitness for purpose indemnity is now subject to the Contractor's aggregate cap and the broad exclusion for consequential loss. While some may not think this goes far enough, FIDIC has taken positive steps to restore the balance to risk allocation, which has made the 1999 Edition so popular to begin with.

Design risk under sub-clause 4.1 (Contractor's General Obligations)

The Contractor's fitness for purpose obligation has been revised under sub-clause 4.1 (*Contractor's General Obligations*) of the 2017 YB and 2017 SB so that it is now defined by reference to the purpose set out in the "Employer's Requirements". Previously this was by reference to the "Contract" as a whole. Defining fitness for purpose by reference to the Employer's Requirements narrows its scope and, if properly dealt with in the Employer's Requirements, should provide greater certainty for the Employer and the Contractor.

In addition, the 2017 Edition of the RB, YB and SB now includes “(or Section or Part or major item of Plant, if any)” in the fitness for purpose obligation, and a default objective position of “ordinary purpose” where the Parties do not expressly define it in the Employer’s Requirements or, we would submit, where the purpose is not clearly defined and described.

“Care of the Works and Indemnities”: Clause 17

The controversial clause 17 – confusingly entitled “Risk Allocation” in the Test Edition – has made way for a more traditional clause (now entitled “Care of the Works and Indemnities”), largely reflecting the corresponding clause in the 1999 Edition (entitled “Risk and Responsibility”). This clause essentially deals with risks associated with damages to the Works and third party claims in an insurance context in order to make clear that, until the completion of the Works, the Contractor takes full responsibility for the care of the Works except for “Employer’s Risks”.

As mentioned above, the controversy primarily related to the inclusion in the Test Edition of an indemnity provided by the Contractor in respect of errors in design which result in the Works not being fit for purpose, which exposed the Contractor to potentially uncapped consequential losses. The reduction in liability to the extent that any “Employer’s Risk” contributed to the same was largely viewed as inadequate in view of the breadth of the indemnity.

With a view to finding a balance between the need to address a valid Contractor criticism of the Test Edition and the position favoured by Employers, a design indemnity has been included in sub-clause 17.4 (*Indemnities by Contractor*) of the 2017 Edition,⁷ but is now (i) fault based, (ii) subject to the cap and (iii) consequential losses are excluded. While this may make the indemnity more palatable, the jury is still out on whether insurers will offer coverage for this risk.

In addition, the increase in prescription generally across the Test Edition applied to clause 17. With it, came a general increase in the list of the Employer’s Risks in order to match the Contractor’s increased liability with its own catch all responsibility for everything outside the Employer’s Risks. Following that trend, the 2017 Edition of each the RB, YB and SB has introduced a catch-all risk for “any act or default of the Employer’s Personnel or the Employer’s other contractors”. As a list that is largely amended (reduced or deleted) by Employers in any event, we do not think Contractors will derive much comfort from this insertion.

⁷ Sub-clause 17.4 (*Indemnities by Contractor*) provides: “The Contractor shall also indemnify and hold harmless the Employer against all acts, errors or omissions by the Contractor in carrying out the Contractor’s design obligations that result in the Works (or Section or Part or major item of Plant, if any), when completed, not being fit for the purpose(s) for which they are intended under sub-clause 4.1 (*Contractor’s General Obligations*)”.

The changes do, however, plug some of the gaps and clear up overlaps in the provisions – such as: (a) the Contractor ceasing to be liable for the care of the works in the event of termination of the Contract under sub-clause 17.1 (*Responsibility for Care of the Works*); and (b) the extent of the Contractor's liability for works performed after completion (in order to avoid conflict with the third-party indemnities) also in terms of sub-clause 17.1 (*Responsibility for Care of the Works*).

PART II: EMPHASIS ON CONTRACT MANAGEMENT IN THE 2017 EDITION

The amendments made in the 2017 Edition to the contract management processes are extensive. Of note is the requirement for a more detailed programme from the outset of the project. This is clearly intended to form part of the drive for (i) better planning and (ii) the Parties to contemporaneously identify significant changes of progress, through both the programme and advance warning processes, and implement solutions to overcome delays as quickly and efficiently as possible, and as the work progresses. Deeming provisions are now much more prevalent, with the aim of addressing potential delays caused by a party's inaction. The Engineer's role in the 2017 RB and YB has also been augmented with increased involvement in active contract management.

Timely performance and delay mitigation is front and centre

Programme: to become a project management tool?

The amendments to the 2017 Edition undoubtedly promote the proactive use of the programme as a project and contract management tool, and as such, the programming requirements under sub-clause 8.3 (*Programme*) have been substantially amended when compared to its predecessor in the 1999 Edition. As already covered by the Test Edition, sub-clause 8.3 (*Programme*) also takes a step in the right direction as far as the utilisation of Building Information Modelling (BIM), and the interface between the programme and design, on international projects. Further recognising the increasing use of BIM, the Guidance Notes published alongside the 2017 Edition include advisory notes for projects using BIM.

A more detailed programme from commencement

An overwhelming shift in the level of detail that the Contractor is required to include in its initial programme can be observed from the amendments made to sub-clause 8.3 (*Programme*) of the 1999 Edition. The amended

clause in the 2017 Edition now requires the programme to deal with a number of new items, such as:

- The Commencement Date and the Time for Completion of the Works and any sections of the Works (which, surprisingly, was not expressly stated in the 1999 Edition).
- The date that the right of access to and possession of the Site (or parts of the Site) is to be given to the Contractor in accordance with the Contract Data (or, in the case of the 2017 SB, simply in terms of sub-clause 2.1 (*Right of access to the Site*)). Focussing on the 2017 RB and YB, an important aspect and inclusion in this provision to note is that if the Contract Data is silent on access and possession dates, for example for sectional completion purposes, then the Contractor is required to set out in its initial programme when it will require such access and/or possession. Consequently, if the Contractor is not able to access or take possession of the Site in accordance with the programme, this could then give the Contractor an entitlement to an extension to the Time for Completion (“EOT”), as the ability to use or occupy the Site is a risk expressly allocated to the Employer (in terms of sub-clause 17.2 (b) (*Liability for Care of the Works*)). An Employer will therefore need to take particular care in ensuring that it either stipulates the access and possession date(s) in the Contract Data if the Employer is yet to secure possession of the site before commencement, or that it has the necessary rights of access and possession of the Site in advance of the Contractor commencing the Works.
- The order of the Works, including when the Contractor intends to submit its documents and the preparation period thereof, installation work and work to be undertaken by nominated sub-contractors must be detailed.
- In a significant move to facilitating active contemporaneous delay analysis (although we can expect Contractors to be reluctant to show (activity) float in their programmes), all activities must be shown to the level of detail specified in the Contract Data, or the Employer’s Requirements under the 2017 SB, “*logically linked and showing the earliest and latest start and finish dates for each activity, the float (if any), and the critical paths*”. Revised programmes must then, for each activity, show “*the actual progress to date, any delay to such progress and the effects of such delay on other activities (if any)*”, further illustrating the intention to use the programme as an adequate project management tool.

The content of the supporting report (which was already a requirement of the 1999 Edition) is now required to identify “*proposals to overcome the effects of any delay(s) on progress of the Works*” and in any revised programme, identify any “*significant change(s) to the previous programme*”. This is of course

most applicable to revised programmes. However, given the increasing use of pre-construction service agreements in practice, it is possible that some activities which are adopted in the subsequent construction phase may already be in delay, possibly requiring the identification of mitigation measures early on. The selected examples above illustrate the significantly enhanced programming obligations under the 2017 Edition under which Contractors are required to undertake a far more intensive programming exercise and interface with a broad range of participants in: (i) the 28-day period from the Commencement Date (noting that the 2017 Edition provides a more generous 14-day period, as opposed to the initial seven-day period, before the Engineer, or the Employer in the case of the SB, gives notice of the Commencement Date); (ii) whenever a programme ceases to reflect actual progress or is otherwise inconsistent with the Contractors obligations; or (iii) within 14 days of receipt of a Notice from the Engineer/Employer (SB) that the programme fails (to the extent stated) to comply with the Contract or ceases to reflect actual progress or is otherwise inconsistent with the Contractors obligations. This is dealt with further below.

The Engineer's/Employer's obligation to review the programme

Keeping with the theme of project management, and in particular the utilisation of the programme as such a tool, the 2017 Edition also imposes a positive obligation on the Engineer, or the Employer in the case of SB, to Review the programme, specifically stating that the Engineer (or the Employer in SB) is to “[r]eview the initial programme and each revised programme”, following which the Engineer/Employer may give notice of non-compliance in the usual way, providing, as the definition of “Review” goes, whether (and to what extent) the programme complies with the Contract and/or with the Contractor’s obligations under or in connection with the Contract, as well as the extent to which it ceases to reflect actual progress. Interestingly, and in a much firmer stance adopted than in the 1999 Edition, in the event that the Engineer/Employer does not give to the Contractor such Notice of non-compliance within: (i) 21 days after receiving the initial programme; or (ii) 14 days after receiving a revised programme, the Engineer/Employer will then be deemed to have given a Notice of No-Objection, and either the initial or revised programme shall then be deemed to have been accepted, and the Parties can then proceed in accordance with and/or rely on that programme.

“New” Advance Warning provisions

The 2017 Edition introduces a new sub-clause 8.4 (*Advance Warning*) requiring each Party to advise the other and the Engineer of any “known or probable future events or circumstances which may” adversely: (i) affect the

work of the Contractor's Personnel; or (ii) the performance of the Works; or increase the Contract Price; and/or delay the execution of the Works or a Section.

The concept of an advance warning was in fact included (although not named "advance warning") in the fourth paragraph of sub-clause 8.3 (*Programme*) of the 1999 Edition. This is nevertheless an interesting development, which again underlines the expectation that both Parties should adopt a more proactive approach to contract and risk management. Although there is no express consequence or sanction for non-compliance, the sub-clause imposes a positive obligation to give an advance warning and failure to do so would amount to a default. In addition, Contractors entitlements to an EOT may be reduced in the event of a failure to comply with this sub-clause pursuant to sub-clause 20.2.7 (*General Requirements*). That sub-clause, which sets out some general requirements for EOT claims, indeed provides that: "*If the claiming Party fails to comply with this or any other sub-clause in relation to the Claim, any additional payment and/or any EOT (in the case of the Contractor as the claiming Party) ... shall take account of the extent (if any) to which the failure has prevented or prejudiced proper investigation of the Claim by the Engineer.*"

New time limits, deeming provisions and notice requirements

In the 2017 Edition, FIDIC sought to introduce a number of new time limits and deeming provisions (35 new deeming provisions in addition to the 22 provided in the 1999 Edition) in, again, a clear move to tightening up the effectiveness of contract management. The key consequences of these time limits and deeming provisions seek to address the delays suffered when a party fails to, for example, respond to a communication, conduct a Review, or issue an approval within a reasonable period. Certainly, under the 1999 Edition, the failure to act, such as the Engineer's failure to make a timely determination was often perceived as a cause of disputes.

As has already been canvassed in the predecessor of this article, the addition by FIDIC of certain deadlines and deeming provisions for both the Engineer and Contractor, however, drew substantial criticism including those around the submission and substantiation of claims under the revised provisions of clause 20 (*Employer's and Contractor's Claims*) (considered below). In response to this criticism, and as promised, the Guidance Notes published alongside the 2017 Edition specifically provide that:

"Each time period stated in the General Conditions is what FIDIC believes is reasonable, realistic and achievable in the context of the obligation to which it refers, and reflects the appropriate balance between the interests of the Party required to perform the obligation, and the interests of the other Party whose rights are dependent on the performance of that obligation. If consideration is given to changing any such stated time period in the Special Provisions (Particular Conditions – Part B), care should

be taken to ensure that the amended time period remains reasonable, realistic and achievable in the particular circumstances.”

As will be outlined below, a number of the more importance changes to time limits and deeming provisions show the enhanced importance and emphasis on the role of the Engineer, reiterating the proactive stance to be adopted by her/him. When translated into practice, there is little doubt that the successful implementation of these time limits and deeming provisions will require substantially more investment in time and resources for the Engineer, the Contractor and their respective personnel.

Set out below are some examples of the more significant changes to time limits and deeming provisions, noting that a number of these changes impact the role and involvement of the Engineer and will be outlined in further detail below:

- **Deemed rejection.** Sub-clause 3.7.3 (*Time limits*) of the 2017 RB and YB and sub-clause 3.5.3 (*Time limits*) of the 2017 SB requires that if the Engineer/Employer’s Representative fails to issue a notice of agreement or a determination within the stipulated time period, in the case of a Claim, the Engineer is “*deemed to have given a determination rejecting the matter or the Claim*”.⁸ Some might wonder whether a true incentive to active contract management on the part of the Engineer/Employer’s Representative should have instead been that the lack of determination of a Contractor’s claim within the prescribed period meant that the claim was in fact approved.
- **Notice of dissatisfaction in respect of the Engineer’s/Employer’s representative determination.** Sub-clause 3.7.5 (*Dissatisfaction with the Engineer’s determination*) of the 2017 RB and YB and sub-clause 3.5.5 (*Dissatisfaction with the Employer’s Representative’s determination*) of the 2017 SB sets out the process by which either party can issue a notice of dissatisfaction (or “NOD”) in respect of the Engineer’s/Employer’s Representative’s determination. A NOD must be given within 28 days after receiving the Engineer’s determination (or deemed rejection, as above), otherwise the determination “*shall be deemed to have been accepted finally and conclusively by both Parties*”. This is a fundamental deeming provision and owing to the newly defined term “*Disputes*” introduced in the 2017 Edition is a claim against the other party which is *rejected in whole or in part*, and in respect of which the claiming party “*does not acquiesce (by giving a NOD under sub-clause 3.7.5 [...] or otherwise)*”. On the basis that, in accordance with sub-clause 21.4

⁸ Note that the sub-clause goes further to require that in the case of a matter to be agreed or determined, this shall then be deemed to be a Dispute. Note further that sub-clause 3.7.3 (*Time Limits*) and sub-clause 3.5.3 (*Time Limits*) under the SB now sets out significantly more detailed processes for arriving at an Engineer’s/Employer’s Representative’s determination than the equivalent sub-clause 3.5 (*Determinations*) in the 1999 Editions of the RB, YB and SB. This is discussed further below.

(*Obtaining DAAB's Decision*), only “*Disputes*” may be referred to the Dispute Board (and under sub-clause 21.6 (*Arbitration*), only “*Disputes*” can be referred to arbitration), it therefore follows that failing to issue a NOD will render the Employer’s determination final and binding, with no prospect of being able to have it overturned.

Finally, the format in which any Notice, or other communication must be given has additional requirements under sub-clause 1.3 (*Notices and Other Communication*) of the 2017 Edition. The Notice or other communication must now not only be in writing, but must also specifically state if it is in fact a notice, or other communication (and if the latter, include reference to the relevant provisions of the Contract under which it is issued). If a Notice is required, the 2017 Edition does not require specific reference to the relevant provision of the contract under which it is issued, leaving the Contractor in particular with a relative amount of breathing space in which to pin its position. This is, however, a clear attempt to improve contract management at site level where instructions and other communications are often issued verbally with no written follow-up. This runs the risk of causing serious difficulties at a later stage, where evidence of such communication is vital, particularly when seeking to assert an entitlement to additional time and/or cost. Compliance with these amendments will no doubt place an additional burden on the Parties but is essential so as to ensure effective communication and project management.

Extension of Time for Completion

The five (three under 2017 SB) existing grounds for an extension to the Time for Completion (EOT) under the 1999 Edition (previously sub-clause 8.4 (*Extension of Time for Completion*)), now sub-clause 8.5 (*Extension of Time for Completion*)) remain intact without substantial changes under 2017 YB and only (albeit importantly) a modified and far clearer EOT entitlement for changes in quantities under 2017 RB. Notably, however, whilst the entitlement to an EOT as a result of a Variation remains, the compliance with sub-clause 20.2 (*Claims for Payment and/or EOT*) (previously sub-clause 20.1 (*Contractor's Claims*)) in relation to a Variation is no longer required. The positions on “*exceptionally adverse climatic conditions*” in the 2017 RB and YB and concurrent delay have also been expanded and clarified.

Exceptionally adverse climatic conditions

Little has changed to the bases on which the Contractor may seek an extension of time for completion, although some welcome clarity has been brought to the meaning of “*exceptionally adverse climatic conditions*”. These are described to mean:

“adverse climatic conditions at the Site which are Unforeseeable having regard to climatic data made available by the Employer under sub-clause 2.5 [Site Data and Items

of Reference] and/or climatic data published in the Country for the geographical location of the Site”.

Foreseeability is thus pegged – by virtue of the definition of “Unforeseeable” – to the date for submission of the tender and the issue of Site data in accordance with sub-clause 2.5 (*Site Data and Items of Reference*). This does, however, to a certain extent place the risk of increasingly volatile and unpredictable weather and climatic conditions caused by global warming with the Employer. Furthermore, the clarification provided limits exposure to exceptionally adverse climatic conditions at Site only and therefore will not apply to adverse climatic conditions being experienced (or suffered) in other jurisdictions, for example, where Plant or Equipment might be procured from, but are being delayed.

Concurrency

Concurrent delay is now mentioned in the 2017 Edition. In short, any assessment of a concurrent delay is to be dealt with as agreed between the Parties. The final paragraph of sub-clause 8.5 (*Extension of Time for Completion*) in the 2017 Edition (in each RB, YB and SB) indeed provides that:

“If a delay caused by a matter which is the Employer’s responsibility is concurrent with a delay caused by a matter which is the Contractor’s responsibility, the Contractor’s entitlement to EOT shall be assessed in accordance with the rules and procedures stated in the Special Provisions (if not stated, as appropriate taking due regard of all relevant circumstances)”.

Prior to entering into the contract, the Parties would be well advised to agree and record who bears the risk of concurrent delay and the rules which govern entitlement to an EOT in the event of concurrent delay. This position is certainly an improvement on the 1999 Edition, which made no mention of any mechanism within which to deal with a concurrent delay, therefore requiring the application of the governing law of the contract.

The Guidance Notes published alongside the 2017 Edition refers to the possible inclusion (or at least reference) of the Society of Construction Law’s Delay and Disruption Protocol (2nd Edition, February 2017). This will go a long way in defining “concurrent delay” and the effects and consequences of concurrency, thereby avoiding a major topic of contention.

It the recent English case of *North Midland Building Ltd v Cyden Homes Ltd*⁹ which considered clause 2.25 of the JCT Design and Build 2005 Edition standard form contract which had been amended so that, “*any delay caused by a Relevant Event which is concurrent with another delay for which the contractor is responsible shall not to be taken into account*” when assessing the Contractor’s

⁹ *North Midland Building Ltd v Cyden Homes Ltd* (QBD (TCC)) [2017] EWHC 2414 (TCC); [2017] BLR 605. The Court of Appeal subsequently confirmed the High Court decision by dismissing North Midland Building’s appeal on 30 July 2018 (*North Midland Building Ltd v Cyden Homes Ltd* (CA) [2018] EWCA Civ 1744).

entitlement to an extension of time. The Contractor, *North Midland*, sought to challenge the effect of that clause by placing reliance upon the doctrine of prevention. At the Court of Appeal, pursuant to *North Midland's* appeal of the High Court's decision, the judge considered it "crystal clear" that the Parties had agreed that the risk of concurrency was to be borne by the Contractor and considered there was no rule of law that prevented the Parties from agreeing that concurrent delay be dealt with in that way, rejecting the argument that the prevention principle was an overriding rule of public or legal policy.

The "Swiss Engineer"

In line with its objective to reduce disputes through a more active contract management approach, the 2017 Edition of RB and YB somehow redefines the role of the Engineer by providing her/him with more power and more responsibility. Clause 3 has expanded from just over a page in the 1999 Edition to five pages in the 2017 Edition, and now contains a considerable amount of procedure for Engineers to follow, particularly in regards to claims.

When considering the consequences of the "new and improved" role of the Engineer, particular emphasis is placed on the time limits by which the Engineer is required to abide. Under the 1999 Edition, there were no time constraints imposed on the Engineer in regards to Determinations. This allowed Engineers to adopt a wait-and-see approach to claims, much to the frustration of claiming Contractors. Under the 2017 Edition (in this case being the RB and YB), the Engineer has a much more active, and prescriptive role.

The Engineer's new role as "neutral"

The most drastic amendments to clause 3 can be found while comparing sub-clause 3.5 (*Determinations*) of the 1999 Edition with sub-clause 3.7 (*Agreement or Determination*) of the 2017 Edition (and consequently, sub-clause 3.5 (*Determinations*) of both the 1999 Edition and 2017 Edition of SB). While sub-clause 3.5 (*Determinations*) of the 1999 Edition of the RB and YB and its corresponding clause in the SB comprised two brief paragraphs, sub-clause 3.7 (*Agreement or Determination*) of the 2017 Edition of the RB and YB and its corresponding clause in the SB, goes on for three pages. This difference in length demonstrates the increased complexity of the Engineer/Employer's Representative's obligations in relation to the determination process.

Sub-clause 3.7 (*Agreement or Determination*) of the 2017 RB and YB begins by requiring that the Engineer "*act neutrally between the Parties*" during the Agreement or Determination period¹⁰ and further clarifies that the Engineer "*shall not be deemed to act for the Employer*" during this time. The

¹⁰ The 2017 Edition of the RB and YB's requirement to act neutrally echoes the 1987 RB's obligation to act impartially. See sub-clause 2.6 of the 1987 FIDIC RB.

meaning of “*shall act neutrally*” as is required under the RB and YB is not defined under the 2017 Edition.

Negotiation and settlement: The Engineer’s new role as facilitator/quasi-mediator

Sub-clause 3.7 (*Agreement or Determination*) (in the 2017 RB and YB and its corresponding clause in the 2017 SB) then inserts a *quasi-mediation* period prior to the Engineer/Employer’s Representative’s determination, during which the Engineer/Employer’s Representative consults with the Parties jointly and/or separately to facilitate agreement. Sub-clause 3.7.1 (*Consultation to reach agreement*) (or the corresponding sub-clause in the 2017 SB) provides:

“The Engineer shall consult with both Parties jointly and/or separately, and shall encourage discussion between the Parties in an endeavour to reach agreement. The Engineer shall commence such consultation promptly to allow adequate time to comply with the time limit for agreement under sub-clause 3.7.3 [Time limits]. Unless otherwise proposed by the Engineer and agreed by both Parties, the Engineer shall provide both Parties with a record of the consultation.

If agreement is achieved within the time limit for agreement under sub-clause 3.7.3 (Time limits) the Engineer shall give a Notice to both Parties of the agreement, which agreement shall be signed by both Parties. This Notice shall state that it is a ‘Notice of the Parties’ Agreement’ and shall include a copy of the agreement ...”

This consultation is therefore expected to encourage a lot more discussions between the Parties and replace what was often seen under the 1999 Edition as a mere formality to be performed by the Engineer prior to making a determination. If an agreement is reached, sub-clause 3.7.1 (*Consultation to reach agreement*) provides that the Engineer/Employer’s Representative should issue Notice to the Parties of the agreement which shall state that it is a “Notice of the Parties’ Agreement” and include a copy of the agreement signed by both Parties) in a welcome move to formalise any such agreement.

The Engineer’s neutral and fair determination

If an agreement is not reached within the stated time frame, or both Parties advise that an agreement cannot be reached within the time limit, the Engineer / Employer’s Representative is required to issue a determination under sub-clause 3.7.2 (*Engineer’s Determination*).¹¹ If no determination is given, the claim will be deemed as rejected.

As in the 1999 Edition, the requirement for the Engineer/Employer/Employer’s Representative to make a *fair* determination has been retained. Importantly, in the 2017 RB and YB, this requirement seems to exist over and above the Engineer’s general obligation to act neutrally when carrying

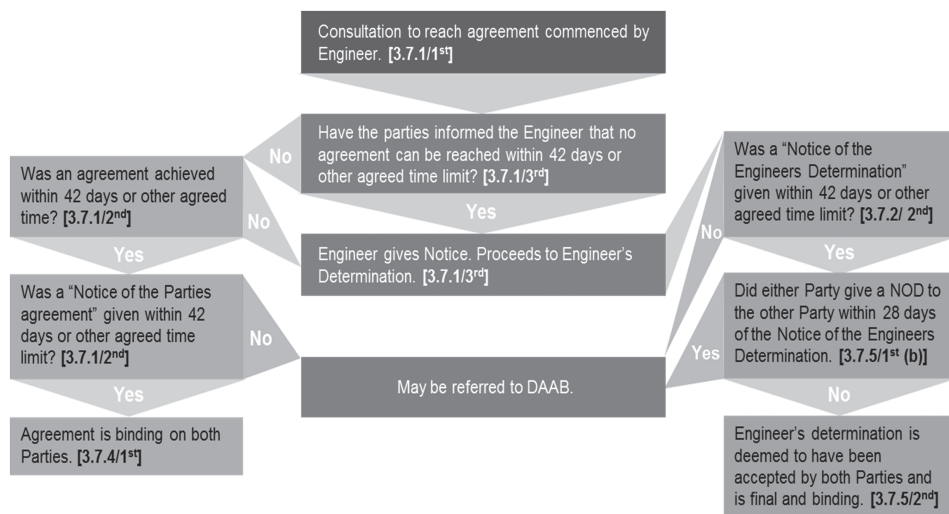
¹¹ Or the corresponding clause for the 2017 SB. Furthermore, under sub-clause 3.7.3 (*Time limits*) this determination is to be issued 42 days after the Engineer was obliged to proceed in lieu of an agreement.

out duties in terms sub-clause 3.7 (*Agreement or Determination*) – to reiterate, while the terms “*neutral*” and “*fair*” are not defined in either the 2017 RB, YB or, in the case of the term “*fair*”, the 2017 SB as well, it certainly appears that the intention behind these amendments, in particular in the RB and YB, seeks to impose stricter standards on the Engineer. One then must have regard to the ordinary meaning of these terms. For example, in English, “*neutral*” means (relevantly, as an adjective):

- “*not supporting either side in a conflict or dispute; impartial*” (Concise Oxford English Dictionary, 2011)
- “*not saying or doing anything that would encourage or help any of the groups involved in an argument or war*” (Cambridge Dictionary, 2018).

So, when making a determination of the matter or Claim, the Engineer in the 2017 RB and YB, must act neutrally *and* make a fair determination. It will, in any event, be of little surprise if disputes surrounding the meaning of these terms subsequently arise. Demonstrating for example that the process adopted by the Engineer was not independent, impartial or unbiased (in the same way an adjudicator is required to act) would now seem good grounds for challenging a determination.

An overview of the revised procedure under the 2017 RB and YB for consulting and determining a matter or claim is depicted in the below flow chart:¹²



¹² The same procedure can be adopted on the basis of the corresponding clauses in SB.

Notice of dissatisfaction with the Engineer's determination

Another significant change within the 2017 Edition is the requirement for the claiming party/Contractor to issue a NOD in respect of an Engineer's determination, failing which the determination becomes final and binding. The time limit for issue of the NOD of 28 days from the relevant date provides a reasonable period for the Contractor to act and will provide clarity as to what is and is not contested by the Contractor during the currency of the project. Note that sub-clause 3.7.5 (*Dissatisfaction with the Engineer's determination*) (in the 2017 RB and YB and its corresponding clause in the 2017 SB) allows for the issuance of a partial NOD. This will allow a Party to strategically time and narrow the scope of the NOD of the Engineer/Employer's Representative's determination, as any partial dissatisfaction will need to be clearly identified therein.

As outlined in the predecessor to this article, when reading the revised determination and enforcement process as a whole, it appears significantly fairer and more robust than that provided in the 1999 Edition.

PART III – REVISED CLAIMS AND DISPUTES PROCEDURES

A fundamental shift from the 1999 Edition to the 2017 Edition comes about in the processing and management of claims, and a separation of claims from the dispute resolution mechanism, ultimately amounting to a full-scale revision of the 1999 Edition's clause 20. Furthermore, "Claims" by the Employer, or the Contractor are now treated equally, with the amendments requiring both these claims to be determined under the same procedure.

These amendments again echo the intention of FIDIC to promote efficient and proactive contract management, and, in the main, should be welcomed by Contractors – whilst the claims procedure generally appears more onerous, the Employer is now obligated to comply with the same standard, with the Engineer (or, in the case of SB, the Employer's Representative) determining all claims fairly, acting neutrally (only under the 2017 RB and YB) and is not, in these circumstances deemed to be acting for the Employer (applicable to each the 2017 RB, YB and SB). Both of the Parties and the Engineer/Employer's Representative will bode well to study the new provisions extensively in order to be as prepared as possible to deal with all time impositions and deeming provisions as required by the Contract. Adequate resourcing, once more, will be essential.

The Claim/Dispute distinction

The creation of a new clause 21 "Disputes and Arbitration" distinct from clause 20 which deals with "Employer's and Contractor's Claims", is symbolically significant as it reinforces the concept that claims are not

the same as disputes, a notion that was – at least in practice – somewhat obfuscated in the 1999 Edition by the manner in which the dispute provisions seemed to flow on directly from the claims process.

New defined terms

In order to achieve this separation, the 2017 Edition includes the new defined terms of “Claim” and “Dispute”. These distinguish between what is, on the one hand, a simple request for something that a party is entitled to, and on the other, a disagreement under the contract which has not been resolved. Clause 1.1.6 defines a “Claim” as being:

“a request by one Party to the other Party for an entitlement or relief under any clause of these Conditions or otherwise in connection with, or arising out of, the Contract or the execution of the Works”.

As for the definition of “Dispute” in sub-clause 1.1.29, it makes it very clear that it applies only in circumstances where a claim has been made and then *rejected* by the other Party or the Engineer. The distinction is not always appreciated in practice, with a certain stigma attached to the assertion of a claim, when in fact a Party is merely enforcing its contractual rights.

Increase in the scope of the Engineer’s powers of determination

This split between Claims and Disputes and the new defined terms to reflect this separation are consistent with FIDIC’s aim of managing the claims processes in a more structured manner. However, it is noteworthy that the extended definition of Claims may dramatically increase the scope of the Engineer’s powers of determination.

Under the 1999 Edition it was clear that the Engineer was to provide her/his determination of claims for additional time and/or money.¹³

However, now that the definition of a Claim includes an “*entitlement or relief ... of any kind whatsoever*” under the Contract or in connection with the execution of the Works,¹⁴ a Claim under the 2017 Edition would include any right to an entitlement or relief that a party may have by operation of the law applicable to the Contract, such as a party’s right in some civil law jurisdictions to suspend work if the other party fails to perform its own obligations under the Contract.

¹³ See (i) sub-clause 2.5 (*Employer’s Claims*) of the 1999 Edition where the Employer may give notice if it “*considers himself to be entitled to any payment [...] and/or to any extension of the Defects Notification Period*”, (ii) sub-clause 20.1 (*Contractor’s Claims*) whereby the Contractor can give notice of any entitlement to an extension of time or additional payment and (iii) generally the provisions which invoke the application of sub-clause 3.5 (*Determinations*) which provides that “*whenever these Conditions provide that the Engineer shall proceed in accordance with this Sub-Clause 3.5 to agree or determine...*”.

¹⁴ See sub-clause 20.1(c) of the 2017 Edition that states: “*... Such other entitlement or relief may be of any kind whatsoever (including in connection with any certificate, determination, instruction, Notice, opinion or Valuation of the Engineer) [excluding claims for additional time and/or money, or claims by or against a third party].*”

On the above basis, the Engineer will be required to issue determinations in respect of legal entitlements arising outside of the contract under the provisions of the applicable law, representing a significant expansion of the scope of the Engineer's powers of determination.

The Equality of Claims

Another key change in the Claims mechanism under the 2017 Edition is that clause 20 now places the Parties' claims on an equal footing by requiring that the Employer's claims are determined under the same procedure as claims made by the Contractor, subjecting the Employer's and Contractor's claims to the same time limits/time bars and the same requisite level of detail.

This addresses the significant imbalance in the determination of the Parties' claims under the 1999 Edition, whereby the Contractor's claim process was much more onerous.¹⁵

The Employer will now have to issue its notice within the 28-day time-period specified and its fully detailed claim within 42 days.¹⁶ The effect of this in practice will undoubtedly be that Employers are obliged to provide greater substantiation of their claims than before.

Contractors will welcome this more egalitarian approach to claims, however, it is likely that Employers will try to simply delete these reciprocal notice provisions.

Claiming for additional time and/or money

The process for claiming additional time and/or money has been overhauled, requiring greater detail, and containing more defined terms, time limits and deeming provisions, forcing both the Employer and Contractor to formulate Claims properly, and sufficiently, from the outset. As a consequence, this may result in fewer rejections by the Engineer/Employer's Representative, again echoing the trend by FIDIC towards stronger contract management, and, ultimately, minimising the risk of disputes.

Procedurally, a Notice of Claim (sub-clause 20.2.1 (*Notice of Claim*)) and full particulars (sub-clause 20.2.4 (*Fully detailed Claim*)) must be given by the claiming Party and the necessary contemporary records must be kept (sub-clause 20.2.3 (*Contemporary Records*)), failing which the claim will become extinct (sub-clauses 20.2.1 and 20.2.4).

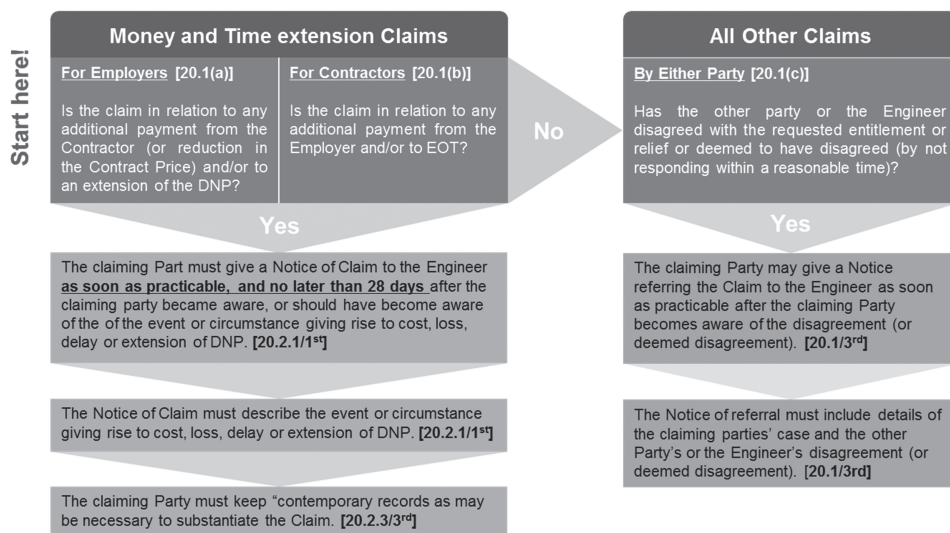
A summary of the extensive claims procedure is set out below:¹⁷

¹⁵ Previously, the Contractor was required to issue its notice within 28 days of it becoming aware of an event or circumstance giving rise to the claim, and to submit a fully detailed claim within 42 days. By contrast, the Employer was merely required to notify the engineer "as soon as reasonably practicable after [it] became aware of the event or circumstance giving rise to the claim" (sub-clause 2.5).

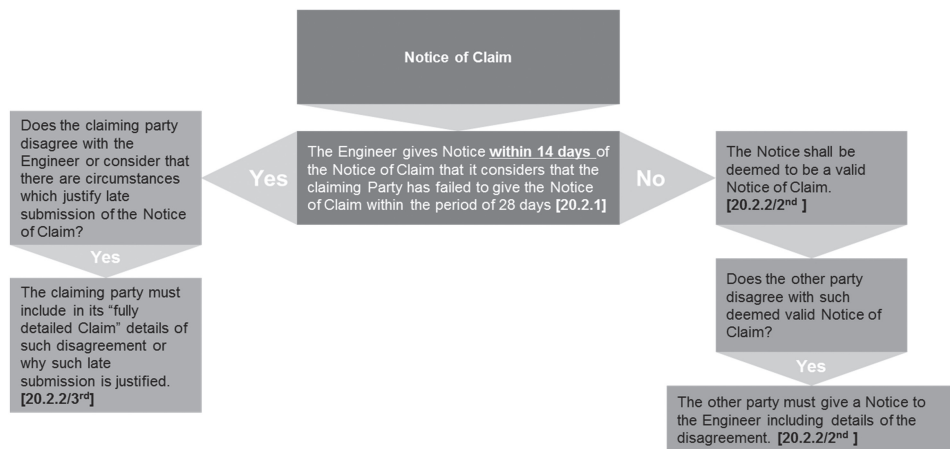
¹⁶ See, sub-clauses 20.2.1, 20.2.3 and 20.2.4.

¹⁷ The same procedure can be adopted on the basis of the corresponding clauses in SB, with the other/non-claiming Party acting in the capacity as the Engineer, in the SB.

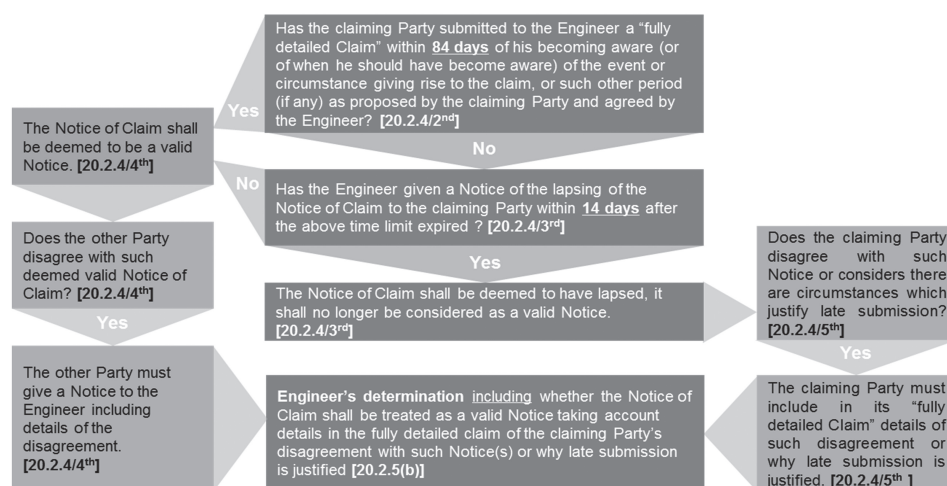
Step 1 – Notifying a Claim



Step 2 – The Engineer's Initial Response to a Claim Notice



Step 3 – Particularising the Claim



Time bars

It follows from the above claims procedure that the 2017 Edition now includes two distinct time bars: (1) for failing to notify a Claim within 28 days in accordance with sub-clause 20.2.1 (*Notice of Claim*); and (2) for failing to particularise that claim within 84 days in accordance with sub-clause 20.2.4 (*Fully detailed Claim*), after the claiming Party became aware, or should have become aware, of the event of circumstance giving rise to the Claim.

Notice of Claim

- A Notice of Claim must be submitted within 28 days after the claiming Party became aware or should have become aware of the event or circumstance, failing which the Claim is time barred and the other Party is then discharged from all liability in connection with that event or circumstances (sub-clause 20.2.1).
- The Engineer (or the other Party under the corresponding clause in the SB) is then required to submit Notice within 14 days stating that the claiming Party failed to give Notice within the 28-day period. However: (i) if the Engineer/other Party fails to submit this Notice within the 14 days, the Notice of Claim is then *deemed* valid; and (ii) if the non-claiming Party disagrees with the ‘deemed valid’ Notice of Claim, that Party shall give Notice to the Engineer/other Party with details of the disagreement.
- Where the Engineer/other Party has submitted a Notice (i.e. that the Notice of Claim is time-barred), the claiming Party can include in its fully detailed Claim (under sub-clause 20.2.4, considered below)

justification for the late submission or details of the Contractor's disagreement as to the Engineer/other Party's Notice.

Fully detailed Claim

- The same process is followed as outlined above for fully detailed Claims except, the period is 84 days after the claiming Party became aware or should have become aware of the event or circumstance (as opposed to the 42-day period proposed in the Test Edition) or such period as may be proposed by the claiming Party and agreed by the Engineer/other Party (sub-clause 20.2.4).
- A fully detailed Claim must include: (a) a detailed description of the Claim; (b) a statement of the contractual and/or other legal basis of the Claim; (c) all contemporary records on which the claiming Party relies; and (d) detailed supporting particulars of the amount and/or EOT claimed (or extension of the Defects Notification Period in the case of the Employer). Critically, however, the Claim will be time-barred *only* if the claiming Party fails to submit the statement under (b), i.e. the contractual and/or other legal basis of the Claim, which one would expect the Contractor would have usually provided with its Notice of Claim.
- The Engineer/Employer's Representative then proceeds under sub-clause 3.7 (or, in the case of SB, sub-clause 3.5) to agree or determine the issue – including a review of whether the Claim is time barred (sub-clause 20.2.5 (*Agreement or determination of the Claim*)). In this regard, if a Notice of Claim is submitted outside of the 28-day period and the Engineer/Employer's Representative *does* give a Notice of late submission, then the Party may submit reasons for the late submission with the fully detailed claim (within 84 days from the event). The Engineer/Employer's Representative will then consider whether the late submission was justified according to the following factors:
 - “whether or to what extent the other Party would be prejudiced by acceptance of the late submission”;
 - [for a Notice of Claim] “... any evidence of the other Party's prior knowledge of the event or circumstance giving rise to the Claim, which the claiming Party may include in its supporting particulars”; and/or
 - [for a fully detailed Claim] “... any evidence of the other Party's prior knowledge of the contractual and/or other legal basis of the Claim, which the claiming Party may include in its supporting particulars.”

The implication of the above is that the timely submission of a Notice of Claim remains at the heart of the Claims procedure under the 2017 Edition. FIDIC has added an additional time bar in respect of the submission of a

fully detailed Claim, but has somewhat softened its impact by limiting it to the contractual and/or other legal basis of the Claim only.

An important consideration in applying the abovementioned time periods to submissions of either a Notice of Claim or the fully detailed Claim is the possibility for a Party to justify a late submission. That said, even if a late submission were to be found to be justified by the Engineer in a subsequent determination, a Tribunal would not be bound by the Engineer's determination (save if the determination in question is final and binding, i.e. if no timely NOD has been issued). This in turn begs the question as to the true benefits of this possibility to justify a late submission.

It follows from this administration-intensive process required by the new Claims regime, that the Parties, including the Engineer/Employer's Representative should remain more than ever careful to ensure they each comply with all relevant timeframes under clause 20 (*Employer's and Contractor's Claims*) (and, with equal potency, sub-clause 3.7 (*Agreement or Determination*)/sub-clause 3.5 (*Agreement or Determination*) under the 2017 SB).

The Dispute Avoidance/Adjudication Board

Notwithstanding the changes made by the 2017 Edition in relation to the definition of "Dispute", and the key changes summarised below, as far as the overall dispute *process* is concerned, there has been no fundamental change to the way in which disputes are dealt with: a dispute arises, is referred to a Dispute (now Avoidance/Adjudication) Board, and then may – on the issuance of a NOD – be referred to arbitration.

However one can, yet again, see a clear shift toward proactive contract management, and encouragement to avoid disputes at the outset.

Standing Board with an enhanced dispute avoidance role

The 2017 Edition recognises that the Dispute Board should play a more active role in dispute avoidance.

Reflecting that objective, its name has changed from DAB (Dispute Adjudication Board) to DAAB (Dispute Avoidance/Adjudication Board) in the 2017 Edition. Beyond that cosmetic change, the 2017 Edition also requires that the DAAB be appointed at the outset of a project, unless the Parties agree otherwise, as a standing/permanent board for all three books RB, YB and SB. The creation of a standing DAAB marks a departure from the previous *ad hoc* nature of the DAB under the 1999 Edition of the YB and SB (appointed only once disputes had arisen), and represents an important shift in the way in which the DAAB is intended to operate. Practically the involvement of the DAAB should increase significantly, with visits to site on a regular basis to assist in the avoidance of disputes, as well as supporting successful project delivery, provided of course that the DAAB is indeed appointed at the outset of the project.

In this regard, the 2017 Edition has addressed the issue often encountered in practice of standing DABs under the 1999 Edition which are not appointed at the outset and which the parties are then struggling to appoint once a dispute has arisen due a lack of cooperation. Sub-clause 21.2(d) of the 2017 Edition has sought to address this by providing a default-mechanism that will apply in case of failure to appoint a DAAB Member or a refusal to co-operate in his/her appointment. The DAAB Member will accordingly be appointed and he/she will be deemed to have agreed to the DAAB Agreement (including provisions relating to monthly and daily service fee). This is a significant improvement to the 1999 Edition which will avoid some deadlock situation in the event a Party was to unreasonably delay the signing of the DAAB Agreement.

The 2017 Edition has also formalised, in sub-clause 21.3 (*Avoidance of Disputes*), the possibility for the DAAB to provide assistance to the Parties and/or informally discuss and attempt to resolve any issue or disagreement that may have arisen between them during the performance of the Contract. Under the 1999 RB, DABs could already perform that role when Parties agreed to jointly refer a matter to the DAB for it to give its opinion. The 2017 Edition now allows the DAAB to invite the Parties to make such a joint request if it becomes aware of an issue or disagreement. This can be initiated at any time during the performance of the Contract but for the period within which the Engineer undertakes his/her sub-clause 3.7 determination, unless the Parties agree otherwise, so as to preserve the strengthened role of the Engineer.

Referral to the DAAB

A 42-day time bar is now imposed on the Parties, requiring referrals of Disputes to the DAAB within this period, commencing from the date upon which a NOD (of an Engineer/Employer's Representative's determination in terms of sub-clause 3.7.5 (*Dissatisfaction with Engineer's determination*), or, in the case of the SB, sub-clause 3.5.5 (*Dissatisfaction with Employer's Representative's determination*)), where sub-clause 21.4.1 (a) (*Reference of a Dispute to the DAAB*) states that "if the Dispute is not referred to the DAAB within this period of 42 days, such NOD shall be deemed to have lapsed and no longer be valid". This is a welcomed increase from the initial proposed period of 28 days under the Test Edition.

Other new provisions include:

- The referral of a Dispute to the DAAB is now deemed to interrupt the running of any applicable statute of limitation or prescription period, unless prohibited by law (sub-clause 21.4.1).
- Where the DAAB orders a payment to be made by one Party to the other it may, at the request of the paying party, order the payee to provide security for repayment of such amount, if there are reasonable grounds to believe that the payee will be unable to repay

in the event that the decision is reversed in arbitration (sub-clause 21.4.3).

- Sub-clause 21.4.4 [*Dissatisfaction with DAAB's decision*] expressly allows for a NOD to be given in respect of part(s) of DAAB decision, reflecting a standard practice under the 1999 Edition.

Compliance with DAAB Decisions

The inclusion of a new sub-clause 21.7 (*Failure to Comply with DAAB's Decision*) in the 2017 Edition is fundamental to the enforcement of DAAB decisions, and goes far beyond the scope initially provided in the 1999 Edition. This sub-clause allows for the failure to comply with a DAAB decision to be referred directly to sub-clause 21.6 (*Arbitration*) without the need to refer it first to a DAAB or Amicable Settlement procedure.

Sub-clause 21.7 explicitly empowers the Tribunal to enforce a DAAB decision through the use of “*summary or other expedited procedure*” by means of “*an interim or provisional measure or an award*.” This is a clear conclusive attempt to resolve the issues previously faced under the 1999 Edition when enforcing DAB decisions that were final but not yet binding.¹⁸ The Tribunal may also “*include an order or award of damages or other relief*” in its interim or provisional measure or award enforcing the DAAB decision. Importantly, such interim or provisional measure or award “*shall be subject to the express reservation that the rights of the Parties as to the merits of the Dispute are reserved until they are resolved by an award*”. This “*express reservation*”, which clearly seeks to answer some concerns raised during the *Persero* saga, is, in the authors’ view, undesirable as it may affect the enforceability of interim or partial awards enforcing DAAB decisions, and in turn defeats their purpose.

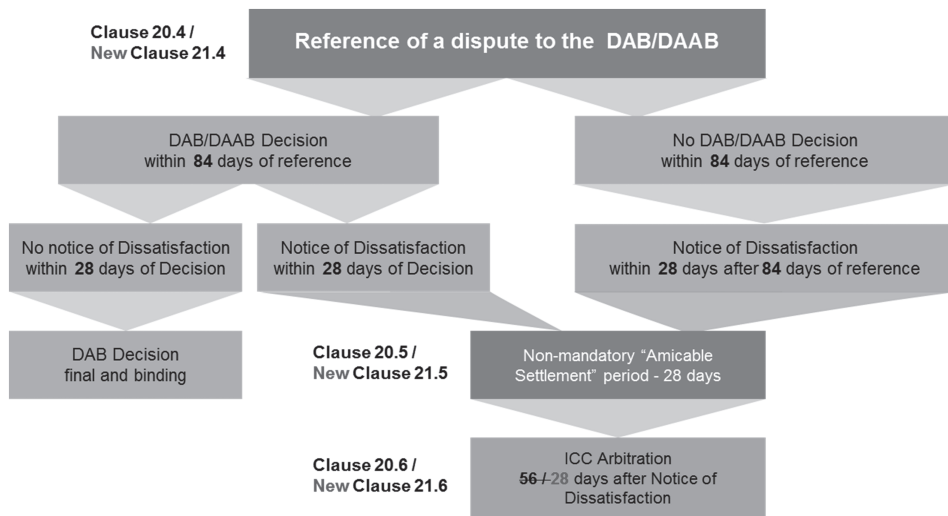
Another, and maybe even more powerful incentive for voluntary compliance with DAAB decisions is the new express right for the Contractor to suspend and terminate the Contract in the event of the Employer’s failure to comply with a DAAB decision (whether binding or final and binding). Set out in sub-clauses 16.1(d) and 16.2.1(d) in the 2017 RB and YB,¹⁹ these provisions are an applauded inclusion in favour of the Contractor and illustrates the paramount right for Parties to have DAAB decisions complied with.

Overview of the dispute process

By way of illustration and ease of application, the below flow diagram outlines a typical sequence of events for the settlement of disputes and arbitration under the new 2017 Edition regime (the 2017 RB, YB and SB applicable):

¹⁸ For further details see Gillion, “Court of Appeal Decision in *Persero II*: Are we now clear about the steps to enforce a non-final DAB decision under FIDIC?”, [2016] ICLR 4.

¹⁹ Sub-clauses 16.1 (c) and 16.2.1 (c) under the 2017 SB.



Arbitration

The arbitration provisions of the 2017 Edition have not been substantially amended, with the principles remaining the same. It is worth noting that FIDIC responded to the extensive criticism surrounding the 182-day time bar which provided in the Test Edition that arbitration had to be commenced within 182 days of giving or receiving the NOD with the DAB's decision. In large projects, this would have necessarily led to arbitration proceedings being commenced before the end of the project, which was obviously not a desirable outcome. This proposed time bar has now been removed.

Like the 1999 Edition's sub-clause 20.6 (*Arbitration*), the new sub-clause 21.6 (*Arbitration*) provides that the dispute is settled by international arbitration, specifically under the Rules of Arbitration of the International Chamber of Commerce. Two new provisions in sub-clause 21.6 (*Arbitration*) are also added:

- the third paragraph of sub-clause 21.6 (*Arbitration*) explicitly allows the tribunal to take into account the extent to which a Party failed to cooperate in constituting the DAAB in deciding the costs of the arbitration; and
- the last paragraph of sub-clause 21.6 (*Arbitration*) explicitly provides that any monetary award in favour of a Party shall be immediately due and payable without further Notice or certification.

Lastly, while sub-clause 21.6 (*Arbitration*) provides for the language of the arbitration, it does not specify the seat of the arbitration. Ideally, the number or arbitrators and arbitral seat should be provided in the Contract Data.

CONCLUSION

The 2017 Edition marks a clear step forward for FIDIC, providing a more even-handed and balanced contract with a greater emphasis on reciprocity between the Parties. This development should indeed be a welcome change for Employers, Contractors and consultants. The 2017 Edition, in the main, achieves its objectives of providing clarity through detail (not only more words) and addresses various legal issues from the 1999 Edition.

Importantly, the underlying risk allocation remains substantially unchanged from the tried and tested approach of the 1999 Edition with which users are familiar.

However, in order for the 2017 Edition to be implemented as intended, Parties need to understand the overall objectives of FIDIC and adopt procurement, negotiation and execution strategies which support the new framework. Projects and Parties will benefit from less risks becoming issues, timely and efficient resolution of claims and fewer disputes.

FIDIC users need to embrace procurement transparency and active contract management. Ultimately, the result should be worth the effort.