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**FIDIC 2017**

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# FIDIC 2017

## A Definitive Guide to Claims and Disputes

Second edition

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# Dedication

To all the caring people in my life who have supported me in the first half, *vous savez qui vous êtes.*

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# Foreword to the second edition

Dispute resolution is a necessary part of construction and engineering contracts. Historically, nothing was said in such contracts about this, leading to inevitable reference only to court litigation. As time went on in the 19th and 20th centuries, arbitration clauses were incorporated in the standard forms and arbitration, on its own, remains a strong favourite with construction contract parties.

Many years ago, FIDIC introduced a prior stage of dispute resolution: the Dispute Adjudication Board, which enabled the Parties to appoint, on larger projects, a three-person tribunal shortly after the Works were due to start or later. Now called the Dispute Adjudication and Avoidance Board (DAAB) under FIDIC contracts, this has become a key stage of dispute resolution. It forms, primarily, two roles of, firstly, helping Parties to avoid or resolve disagreements before they become full-blown Disputes and, secondly, making a (usually) reasoned decision on any Dispute which still finds its way to the DAAB.

Through their different iterations, FIDIC produced the 2017 versions of the Red, Silver and Yellow forms of contract. The first edition of Nicholas Brown's book addressed disputed Claims arising, passing through the DAAB process into the arbitration stage. However, in late 2022, FIDIC introduced through various Amendments, and in particular Amendments Issue No. 3, an earlier stage, namely a potentially binding determination of any given Claim by the Engineer appointed under the contract in question pursuant to Sub-Clause 3.7.4. In an historic sense, this has reintroduced the previously well-understood involvement of the Engineer in dispute resolution at an early stage, this having been part and parcel of the early editions of the engineering forms issued by the UK Institution of Civil Engineers in the last century.

Key advantages of upgrading the Engineer's determination responsibility are that it provides both a focus to the Parties at this early stage of dispute resolution of the need for the Engineer to articulate his or her view, by way of decision; and a relatively cheap process in so doing. It can have the advantage of reducing the scope of any disputed Claim in that one or other or both Parties can limit what they take on to the next stage and, if the determination is well reasoned, good chance of it being accepted by the Parties.

That, together with a number of other necessary amendments, and several further Practice Notes issued by the ICC since the 2022 versions of these contracts were produced, has rendered

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it necessary for this second edition to be produced. It is very much to be welcomed, not least because the pre-arbitration stages of dispute resolution can produce decisions which are binding unless they are effectively challenged within an agreed timescale and, therefore, are key.

Nic Brown has, again, done a fine job in charting a readily comprehensible way through what are often complex provisions or provisions made complex by the myriad factual situations in which Parties find themselves. He has done this by reference not only to the wording but also by reference to the different practices applicable in numerous different legal jurisdictions throughout the world. These include the USA, Canada, the UK, European jurisdictions (such as France and Germany), African jurisdictions (such as Egypt and South Africa), Asian jurisdictions (such as the PRC, the Philippines, India and Singapore), South America (Brazil) and Australia. Added to this are decisions of ICC arbitrators.

It has to be remembered that, because these three stages of dispute resolution are now necessary to produce an ultimately final and binding decision on disputes, each stage is both practically and legally important.

The author has produced a new edition which not only examines each stage of the dispute resolution process from the Claim stage through the DAAB stage to the arbitration stage, but also does it in a way which is logical, thorough and, importantly, readable. Readers can use this book as a reference for individual issues during this process that may arise in many legal jurisdictions in the world. It can also be used by aspiring, or even established, professional practitioners in the area (and not just lawyers), to learn about, identify and solve problems which arise on a practical but well-founded basis.

I am happy to commend this book as an essential source for all those involved in engineering and building projects in which the 2017 FIDIC suite of contracts is or is likely to be used. These will include lawyers, engineers and related professionals of all disciplines, project management personnel at all levels, funders, government personnel involved in projects, arbitrators, adjudicators and students. I have certainly found it easy to read and navigate and have indeed seen a number of things of which I was unaware (but am no longer).

**Sir Robert Akenhead KC, FCI Arb  
London**

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# Foreword to the first edition

Anyone considering making a Claim under FIDIC 2017 faces a difficult task of navigating a path to success. This book masterfully maps that path and provides a guide to the necessary steps in the multi-tiered process to be followed in establishing the Claim. It explains the difference between the provisions in the Red, Yellow and Silver forms and uses figures to explain some of the complexities involved in navigating the various processes.

The role of the Engineer in amicable settlement and agreement of a Claim is an important part of the process, at least in the Red and Yellow forms, and there are useful chapters dealing with the amicable settlement and implementation of the agreement. The development of the dispute board into a DAAB (Dispute Avoidance/Adjudication Board) under FIDIC 2017 is also given full coverage. The DAAB offers a process which, in the first place, can avoid Disputes by providing informal assistance. Best practice now requires the Parties, at an early stage, to see whether their issues can be resolved before they become a developed Dispute. Experience shows that Dispute avoidance techniques can be very effective. The DAAB's adjudication powers are then an essential part of the mechanism allowing for an early and quick decision on Disputes which cannot be avoided or settled.

One of the problems of the DAAB system is the difficulty of enforcing a binding or final and binding DAAB decision. This book helpfully deals fully with the remedies available where a DAAB decision is not complied with. Although there is no longer a need for a further DAAB decision, there is still a need to go through the arbitration route and obtain an award before a party can then take that award to a court to obtain enforcement. This has led to problems in jurisdictions where the enforcement of a binding, but not final, decision by way of an arbitral award has proved difficult. Many jurisdictions now have domestic adjudication where similar decisions are regularly enforced directly by courts. The combination of this and the new role of international commercial courts now allows DAAB decisions to be taken directly to a court for enforcement. That avoids an unnecessary arbitration stage and allows for enforcement directly in the appropriate jurisdiction or for a portable court judgment to be taken to another jurisdiction for enforcement.

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It is surprising that this development in adjudication and international courts has not led to DAAB decisions being carved out of the arbitration regime for direct court enforcement. While bespoke amendments can be and are being made to allow for this, proper enforcement of DAAB decisions in this way may have to await the next edition of FIDIC.

This book then completes the last stages by dealing with the further possibility of amicable settlement before final resolution of the dispute under the embedded ICC (International Chamber of Commerce) provision or another arbitration or litigation option. The comprehensive way in which Nic Brown deals with all these topics does, as the title states, make this book the definitive guide to Claims and Disputes under FIDIC 2017. He is to be congratulated on providing necessary guidance and, in doing so, drawing on court decisions and arbitral awards worldwide. It is to be hoped that those administering FIDIC contracts or considering Claims under those forms will read this book and avoid the pitfalls which are too often seen in arbitration or the courts.

**Sir Vivian Ramsey KC FEng  
London and Singapore  
May 2021**

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# Preface to the second edition

Since the publication of the first edition of this textbook, on 15 November 2021, the field of study has seen two major publications – namely, the Second Edition of FIDIC’s ‘Green Book’, published in December 2021; and FIDIC’s consolidated set of part corrigenda and part amendments, known as ‘Amendments Issue No.3’, published in November 2022. An explanation of the content, meaning and effect of both publications – so far as they are relevant to claims and disputes – features throughout several of the chapters of the second edition of this book. Each FIDIC publication warrants an introduction, although the content of Amendments Issue No. 3 is set out more extensively, in one place, immediately below.

## **The Green Book (Second Edition 2021)**

In December 2021, FIDIC published the second edition of the Short Form of Contract (‘GB2021’), originally published in 1999. Primarily, GB2021 is an updated text aimed at ‘meet[ing] the current demand of the international construction industry for projects where the perceived level of risk is low, and/or where construction parties wish to use a form which is simple to use and does not require significant contract administration and management resources’. True to this aim, GB2021 regulates in a relatively concise manner the genesis, formalisation and disposal of claims in a manner that echoes the elegant composition of the FIDIC Red 4th and its sibling, the Conditions of Subcontract for Works of Civil Engineering Construction (1st Edition 1994). In the view of some, this is an up-and-coming model construction contract – so much so that it behoves a title claiming to afford the reader a definitive guide to claims and disputes under the current mainstream FIDIC suite to engage with GB2021 substantively. Such is the aim of this second edition of the book.

In order to gather a more contextual grasp of the printed word of GB2021 and indeed that of the commentary offered herein, the reader is encouraged to first read the passages venturing an explanation of the corresponding provisions of RB2017, YB2017 and SB2017 before turning to the subsequent treatment of the corresponding provisions of GB2021, mindful, of course, of the usual importance of textual difference.

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## **Amendments No. 3<sup>1</sup>**

### **I. Introduction**

On Monday 28 November 2022, on the eve of the annual FIDIC International Users' Conference, a briefing was convened in London to explain a third round of amendments that FIDIC had made to the original versions of RB2017, YB2017 and SB2017. FIDIC refers to these as the 'Amendments Issue No. 3 – November 2022', and in this book they are called the 'Amendments No. 3'.

The major content of Amendments No. 3 is outlined below with a focus primarily on RB2017 and YB2017. There is a discussion of some notable implications of Amendments No. 3, beginning, in Sections II and III below, with some background and a general introduction to them. In Section IV, each of the substantive amendments is considered one by one. In Section V, there is a review of the points of clarification, leaving all other content of the Amendments No. 3 which appear to be purely corrective in nature. The account concludes, at Section VI, with two drafting notes.

### **II. Background to Amendments No. 3**

In December 2018, FIDIC published Errata to each of RB2017, YB2017 and SB2017. These errata sheets listed around 25 'significant errata' therein, not including minor typographical errors and layout irregularities. Then, in June 2019, FIDIC published a memorandum correcting a further three layout irregularities. Subsequently, FIDIC reviewed the text of RB2017, YB2017 and SB2017, having regard to comments and queries raised by users and commentators. The results of this review are 'Amendments No. 3', unveiled at the briefing mentioned above.

### **III. General**

The errata comprise:

1. *Amendments to the FIDIC Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer, Second Edition 2017;*

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<sup>1</sup> This is a reproduction (and updating) of an article written by Kerry Higgins (a solicitor and Associate of Pinsent Masons LLP) and I, entitled *FIDIC's Amendments Issue No. 3 (1 January 2023)*, republished with the kind permission of the Editors of *Construction Law International*; see Brown and Higgins, 2023.

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2. *Amendments to the FIDIC Conditions of Contract for Plant & Design-Build for Electrical & Mechanical Plant, and for Building and Engineering Works, designed by the Contractor, Second Edition 2017*; and
  3. *Amendments to the FIDIC Conditions of Contract for EPC/Turnkey Projects, Second Edition 2017*.

They are incorporated into a reprint of each of RB2017, YB2017 and SB2017.

At the briefing, the contents of Amendments No. 3 were introduced and some of the background considerations explained. They were said to be mostly clarifying the intent of the FIDIC Contracts Committee's Updates Special Group and Update Task Group when producing RB2017, YB2017 and SB2017 following market feedback. Whereas FIDIC's briefing followed the order of the content of RB2017, YB2017 and SB2017, this note addresses them in turn, starting with what might be regarded as substantive amendments, followed by the matters of clarification.

## **IV. The substantive amendments**

### **(1) The 'Dispute'**

FIDIC has changed the scope of a 'Dispute' in several respects. Sources indicate that the dual aims of these changes were, firstly, to clarify what distinguishes a 'Claim' from a matter to be agreed or determined under sub-paragraph (a) of Sub-Clause 3.7 [*Agreement or Determination*] and a 'claim', and, secondly, to narrow the twin 'gateways' through which a Claim or matter must pass before it may correctly be regarded as a 'Dispute'. This is indeed apparent from the textual changes.

Firstly, as regards the conceptual distinctions, by virtue of the relevant amendments, the matter to be agreed or determined by the Engineer may in time be, yet need not yet have been, made the subject of a 'claim'. It need only be a matter to be determined under sub-paragraph (a) of Sub-Clause 3.7 [*Agreement or Determination*] (more about that below at section IV(2)).

Secondly, the amendment has expanded the role of the Engineer and the NOD by requiring that the Claim or matter

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must have been the subject of an Engineer's determination and a relevant NOD before it may correctly be regarded as the subject matter of a 'Dispute'. The original text that is common to Sub-Clause 1.1.29 of RB2017, YB2017 and SB2017 defines 'Dispute' as any situation where a 'claim' is made by one Party against the other, the claim is then rejected, and the claiming Party does not acquiesce to such rejection. The amendment to Sub-Clause 1.1.29, however, clarifies that the Claim or a Party's assertion(s) in respect of a matter (as the case may be) must pass through two formal 'gateways' – namely:

- a Determination: whatever the stance of the Party other than the one that has notified the Claim or relevant matter, the Engineer must have given a formal determination that rejects (in whole or in part) the Claim or the first Party's 'assertion(s) in respect of the matter'; and
- a NOD: a Party must have given a NOD under Sub-Clause 3.7.5 with respect to the determination. Hence, it is no longer sufficient that the first Party has not indicated acquiescence with the determination by some other means.

The gateways are subject to three exceptions:

- (a) there is a failure as referred to under sub-paragraph (b), or a non-payment as referred to under sub-paragraph (c), of Sub-Clause 16.2.1 [*Notice*];
- (b) the Contractor is entitled to receive financing charges under Sub-Clause 14.8 [*Delayed Payment*] but does not receive payment thereof from the Employer within 28 days after his request for such payment; or
- (c) a Party has given:
  - (i) a Notice of intention to terminate the Contract under Sub-Clause 15.2.1 [*Notice*] or Sub-Clause 16.2.1 [*Notice*] (as the case may be); or
  - (ii) a Notice of termination under Sub-Clause 15.2.2 [*Termination*], Sub-Clause 16.2.2 [*Termination*], Sub-Clause 18.5 [*Optional Termination*] or Sub-Clause 18.6 [*Release from Performance under the Law*] (as the case may be);

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and the other Party has disagreed with the first Party's entitlement to give such Notice[.]

FIDIC's representatives explained in the briefing that FIDIC introduced paragraph (c) above to make it clearer that the DAAB will be competent to determine whether or not a Party was entitled to terminate the Contract. In either of these exceptional cases, a Dispute will be deemed to have arisen, which may be referred by either Party under Sub-Clause 21.4 without the need for a NOD.

The effect of these amendments is to clarify the potential breadth of the subject matter of a 'Dispute' (which is not limited to a 'claim' – see further below at section IV(2)) and to establish the primacy of the formal determination and the NOD as the only instruments by which a 'Dispute' may be created (or 'crystalised' to use the popular term) except where one of the common exceptional cases applies.

To the extent that the amended Sub-Clause 1.1.29 is adopted in a real-world contract, two particular consequences are foreseeable. Firstly, consulting engineers who perform the functions of the Engineer or Employer's Representative are likely to become busier because users of RB2017, YB2017 and SB2017 will see a need to ensure that a claim that is contentious will be referred, in the first instance, to the Engineer for a formal determination and not directly to the DAAB. Explaining the amendment, the then legal advisor to the FIDIC Contracts Committee, Mr. Christopher Seppälä, observed:

*... to further reinforce the role of the Engineer; it was decided to clarify that no matter or Claim could be referred to the DAAB which had not been referred to the Engineer under Sub-Clause 3.7 by requiring that a NOD must have been given in order for a Dispute to exist.*

Secondly, it is perhaps noteworthy that the three exceptions common to the requirements for a formal determination and a NOD do not include a situation in which a Party might wish to enliven the enforceable powers of the DAAB to grant provisional relief under Rule 5, paragraph (j) of the DAAB Procedural Rules without waiting for a formal determination to be given (or the 'time limit for determination' to run its course) and then giving a NOD. Thus, if the Employer gives a Notice of Claim under Sub-Clause 20.2 [*Claims For Payment and/or EOT*] for the

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payment of Delay Damages by the Contractor based on a failure to comply with Sub-Clause 8.2 [*Time for Completion*] and then immediately brings a demand under a Performance Security for sums corresponding to the Delay Damages, whatever the merits of the situation, pending a relevant and valid determination by the Engineer (or the expiration of the ‘time limit for determination’) and a relevant and valid NOD, the Contractor might struggle to persuade the standing DAAB that it is competent to grant provisional relief. Notably, the Engineer does not possess a similar power to grant provisional relief.

## **(2) ‘Claim’, ‘any matter...’ and ‘claim’**

Due to the amended wording of Sub-Clause 1.1.29, there are now two things that may form the subject matter of a ‘Dispute’ – namely:

- (a) a ‘Claim’, which is defined in Sub-Clause 1.1.6 of RB2017 and Sub-Clause 1.1.5 of YB2017; or
- (b) ‘a matter to be agreed or determined by the Engineer under sub-paragraph (a) of Sub-Clause 3.7 [*Agreement or Determination*]’.

It appears from a fair reading of Sub-Clause 1.1.29 of the *original* versions of RB2017 and YB2017 that either of these things had the potential to form the subject matter of a ‘Dispute’, attracting the DAAB’s jurisdiction. However, as noted, the conflation of the words ‘claim’ and ‘Claim’ in Sub-Clauses was apt to confuse.

On the one hand, the ‘Claim’ – as defined in Sub-Clause 1.1.6 of RB2017 and Sub-Clause 1.1.5 of YB2017 – was (and will remain) a broad thing, comprising a request for or assertion of an entitlement or relief. As noted, the first paragraph of Sub-Clause 20.1 of both RB2017 and YB2017 elaborates on this general definition with particular reference to each, or either, Party. On the other hand, the ‘claim’ – not an explicitly defined term under either the original or revised versions – appears to have undergone some change. Whereas, under the original versions, it was either a ‘Claim’ or a ‘matter to be determined by the Engineer under these Conditions, or otherwise’, now it will be any claim that may be made against a third party, say, under the Performance Security, under a guarantee, under an insurance policy, or in connection with intellectual industrial property rights. The

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source of the ‘Dispute’ is also important, not least because if it stems from a ‘Claim’ then (at the very least) a mandatory customised notification procedure, laid out in Sub-Clause 20.2 – involving initiation of the Claim, the possible amicable resolution of it, failing which the determination of it – applies to it. Otherwise, the more general mandatory notification procedure applies to it.

FIDIC considered that it would assist users for there to be greater clarity as to whether something is (a) a Claim; (b) ‘a matter to be determined by the Engineer under the Conditions, or otherwise’ (which in some cases may be regarded as a nascent Claim); or (c) a ‘claim’. Hence the amendments to Sub-Clauses 1.1.29 (discussed above) and 3.7. As to the latter, these take the form of the following textual changes to the second paragraph of Sub-Clause 3.7:

Firstly, the ‘matter[s]’ that the Engineer must facilitate agreement on, or determine, are specified. In the case of RB2017, the 13 specified matters are:

1. under Sub-Clause 4.7.3 [*Agreement or Determination of rectification measures, delay and/or Cost*]: whether or not there is an error in the items of reference; whether or not an experienced contractor exercising due care would have discovered it at either of two (specified) points in time; and what measures (if any) the Contractor is required to take to rectify the error;
2. under Sub-Clause 10.2 [*Taking Over Parts*], where there has been a partial Taking Over of the Permanent Works: the reduction in the Delay Damages for completion of the remainder of the Works;
3. under Sub-Clause 11.2 [*Cost of Remedying Defects*], where work is required to remedy defects or damage during the Defects Notification Period: the cause of such defective work;
4. under Sub-Clause 12.1 [*Works to be Measured*], where the Contractor considers that measurement of the Works is inaccurate: the re-measurement of the Works;
5. under Sub-Clause 12.3 [*Valuation of the Works*]: the appropriate rate or price for any item of work;
6. under Sub-Clause 13.3.1 [*Variation by Instruction*]: EOT (if any) and/or the adjustments to the Contract Price occasioned by the execution of a Variation;

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7. under Sub-Clause 13.5 [*Daywork*]: the resources used in executing a day's work on a 'daywork basis', for which the Daywork Schedule specifies that payment is due;
  8. under Sub-Clause 14.4 [*Schedule of Payments*], where a Schedule of Payments is used and specifies the instalments in which the Contract Price will be paid and these instalments are not defined by reference to actual progress and actual progress is found by the Engineer to differ from that on which the Schedule of Payments was based: the revised instalments;
  9. under Sub-Clause 14.5 [*Plant and Materials intended for the Works*], where Plant and/or Materials are listed in the Contract Data for payment when shipped and/ or payment when delivered and the Contractor has fulfilled certain documentary pre-conditions: the amount to be added for Plant and Materials which have been shipped or delivered (as the case may be) to the Site for incorporation in the Permanent Works;
  10. under Sub-Clause 14.6.3 [*Correction or Modification*]: any correction or modification that should properly be made in a Payment Certificate having regard to a Statement submitted by the Contractor identifying any amounts to which the Contractor considers itself entitled that were not included in the immediately preceding IPC;
  11. under Sub-Clause 15.3 [*Valuation after Termination for Contractor's Default*], after termination of the Contract under Sub-Clause 15.2 [*Termination for Contractor's Default*]: the value of the Permanent Works, Goods and Contractor's Documents, and any other sums due to the Contractor for work executed in accordance with the Contract;
  12. under Sub-Clause 15.6 [*Valuation after Termination for Employer's Convenience*], following a termination of the Contract under Sub-Clause 15.5 [*Termination for Employer's Convenience*]: the value of work done and the amount of any loss or profit or other losses and damages suffered by the Contractor as a result of the termination; and
  13. under Sub-Clause 18.5 [*Optional Termination*]: the 'value of work done' (as defined expansively in the third paragraph thereof) prior to a Party's giving of a Notice of optional termination of the Contract to the other Party.

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In the case of YB2017, the specified matters are all those outlined above with respect to Sub-Clauses 4.7.3, 10.2, 11.2, 13.3.1, 13.5, 14.4, 14.5, 14.6.3, 15.3, 15.6 and 18.5, and additionally under Sub-Clause 1.9, i.e. whether or not there is an error, fault or defect in the Employer's Requirements; whether or not an experienced contractor exercising due care would have discovered it at either of two (specified) points in time; and what measures (if any) the Contractor is required to take to rectify it.

Thus, these amendments in turn clarify the difference between (a) a 'Claim'; and (b) 'a matter to be determined by the Engineer under the Conditions, or otherwise', and they distinguish both from a 'claim' of which neither Party is a direct recipient. It may be said that these 'amendments' only make clearer (and perhaps under some systems of law, codify) those various matters that the Engineer (or Employer's Representative as the case may be) is empowered to agree or determine and which might become a 'Dispute' requiring the assistance of the DAAB. This should assist Parties with the proper discharge of their administrative obligations.

### **(3) 'Exceptional Events'**

The second paragraph of Sub-Clause 17.2 [*Liability for Care of the Works*] absolves the Contractor from liability or loss or damage to the Works, Goods or Contractor's Documents caused by several specified 'events', including – in its original form – '*any of the events or circumstances listed under sub-paragraphs (a) to (f) of Sub-Clause 18.1 [Exceptional Events]*'. If (inter alia) that event occurs and results in damage to the Works, Goods or Contractor's Documents, then, pursuant to the third paragraph of Sub-Clause 17.2 [*Liability for Care of the Works*], the Contractor must promptly give Notice to the Engineer and rectify the loss and/or damage that may arise to the extent instructed by the Engineer and the instruction shall be deemed to have been given under Sub-Clause 13.3.1 [*Variation by Instruction*] – i.e., to be instructing a Variation.

In a similar vein, where the Contractor is the affected Party and suffers delay and/or incurs Cost by reason of (inter alia) the 'Exceptional Event', unless it is a 'natural catastrophe such as earthquake, tsunami, volcanic activity, hurricane or typhoon', Sub-Clause 18.4 [*Consequences of an Exceptional*

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*Event*] entitles the Contractor to EOT and/or payment of Cost (provided in the latter case the ‘*Exceptional Event is of the kind described in sub-paragraphs (a) to (e) of Sub-Clause 18.1 ... and, in the case of sub-paragraphs (b) to (e) of that Sub-Clause, occurs in the Country*’). Thus, both remedial provisions in Sub-Clauses 17.2 and 18.4 are grounded in the drafting of the events or circumstances listed under sub-paragraphs (a) to (e) of Sub-Clause 18.1.

This is where FIDIC has made a substantive change to the wording of the original form of RB2017, YB2017 and SB2017. By stating that it was ‘*[s]ubject to Sub-Clause 18.4*’ the third paragraph of Sub-Clause 17.2 was unclear as to how the relief available under the second paragraph of Sub-Clause 17.2 interacted with that available under Sub-Clause 18.4. FIDIC has sought to clarify this interrelationship by amending the third paragraph of Sub-Clause 17.2 so that it states that the Contractor’s aforementioned obligation and the deemed Variation ‘*shall be without prejudice to any other rights the Contractor may have under Sub-Clause 18.4.*’ Accordingly, if the Engineer does not issue any instruction following Notice, but the Contractor still suffers delay and/or incurs Cost by reason of the Exceptional Event, there is still potential (subject to stated conditions) for entitlement to EOT and payment of the Cost.

Secondly, it was explained that the conceptual definition of ‘Exceptional Event’ was always intended to involve five formative elements – not merely the four enumerated in sub-paragraphs (i) to (iv) of the definition of ‘Exceptional Event’ appearing in the first paragraph of Sub-Clause 18.1 [*Exceptional Events*] – namely, something that (or about which):

- (i) *is beyond a Party’s control;*
- (ii) *the Party could not reasonably have provided against before entering into the Contract;*
- (iii) *having arisen, such Party could not reasonably have avoided or overcome; and*
- (iv) *is not substantially attributable to the other Party.*

Arguably, however, a distinct requirement that the event be ‘exceptional’ (which perhaps begs the question, ‘exceptional to what?’) was not apparent from the *substantive* text of Sub-Clause 18.1 (contrast the reference in paragraph (c) of Sub-Clause 8.5

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*[Extension of Time for Completion]* to ‘*exceptionally adverse climatic conditions*’). Beyond the use of the term ‘exceptional’ in the headings (which ‘*shall not be taken into consideration in the interpretation of these Conditions*’), there was no mention of it in the definitional list. The relevant amendment to Sub-Clause 18.1 of the Rainbow Suite makes explicit (and, arguably, introduces) a distinctly recognisable requirement for exceptionality. Thus, an ‘Exceptional Event’ means an **exceptional** event or circumstance which: (i) ...; (ii) ...; (iii) ...; and (iv) ...’ (emphasis provided). One might also consider whether a superadded requirement of exceptionality was necessary in view of the combined nature of four distinctly enumerated elements.

#### **(4) Error in the terms of reference and errors (etc.) in the Employer’s Requirements**

Sub-Clause 4.7 *[Setting Out]* obliges the Contractor to (inter alia) set out the Works in relation to the items of reference under Sub-Clause 2.5 *[Site Data and Items of Reference]*, verify the accuracy of all the items before they are used for the Works, and give a Notice to the Engineer describing any error in any items of reference.

Similarly, Sub-Clause 1.9 *[Errors in the Employer’s Requirements]* of YB2017 obliges the Contractor to give a Notice to the Engineer within a certain period of any error, fault or defect that the Contractor finds as a result of scrutinising them under Sub-Clause 5.1 *[General Design Obligations]*.

In these respects, FIDIC has recognised two relevant possibilities requiring additional treatment. Firstly, that if an error in the items of reference and/or an error, fault or defect in the Employer’s Requirements does (or do) require the issuance of an instruction(/s) to execute a Variation under Sub-Clause 13.3.1, then that provision will itself cater for any delay suffered as a result of the execution of the Variation and the evaluation of it.

Secondly, that although the discovery of an error (etc.) of this sort might not require the issuance of an instruction to execute a Variation under Sub-Clause 13.3.1, it might still cause the Contractor to suffer delay and/or incur Cost – for instance, because the Engineer instructs the Contractor to suspend the execution of a part of the Works while the error (etc.) is being investigated.

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Accordingly, amendments to be made to the second paragraph of Sub-Clause 4.7.3 [*Agreement or Determination of rectification measures, delay and/or Cost*] and the fourth paragraph of Sub-Clause 1.9 [*Errors in the Employer's Requirements*] (in the case of YB2017) are intended to afford the Contractor access to EOT and/or payment of Cost Plus Profit in such a scenario.

## **(5) FIDIC appointments**

FIDIC has sought also to address two possible scenarios in the practice of 'constituting' a DAAB. The first scenario involves a failure by the Parties to agree the terms of the DAAB Agreement with an agreed appointee to the DAAB or an agreed replacement of a Member of the DAAB within 14 days after s/he has been advised by the Parties that they have agreed to his/her appointment. The original wording of Sub-Clause 21.2 [*Failure to Appoint DAAB Member(s)*] does not explicitly cater for this scenario.

The amendment provides that in such circumstances (as well as the original conditions set out in Sub-Clause 21.2, subparagraphs (a) to (d)), unless otherwise agreed by the Parties, either or both Parties may apply to the President of FIDIC or a person appointed by the President (whereas previously it was '*the appointing entity or official named in the Contract Data*') for a suitable appointment of the member(s) of the DAAB or the replacement thereof; or to set the terms of the appointment, including the amounts of the monthly fee and the daily fee for each member or replacement – in both cases '*after due consultation with both Parties and after consulting the prospective member(s) or replacement*'.

The second scenario concerns the constituency from which the prospective member(s) or replacement may be drawn. In this regard, FIDIC has sought also to address the perceived lack of clarity of the source for these appointments by adding a second paragraph to Sub-Clause 21.2 that states as follows:

*Selection of the member(s) or replacement to be so appointed shall not be limited to those persons named in the list in the Contract Data or, in the case of subparagraph (d) above, to the member(s) or replacement agreed by the Parties.*

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In circumstances where someone is setting the terms of appointment of the member(s) or a replacement, extending the source of appointments beyond those persons named in the list in the Contract Data or the member(s) replacement agreed by the Parties makes eminent commercial sense; although, it might be thought that this diminishes party autonomy by taking the choice out of the hands of the Parties, who have each contributed to, and then agreed, a list of proposed members of the DAAB. In this regard, FIDIC appears to be seeking to strike a balance between the competing interests of economy and Party autonomy that recognises value in the certification standards applied to the members of the FIDIC President's List of Approved Dispute Adjudicators.

## **(6) DAAB Member's disclosure-relation period and prior disclosure**

Clause 4 [*Independence and Impartiality*] of the Appendix [*General Conditions of DAAB Agreement*] sets out positive requirements and prohibitions on a DAAB Member's state of affairs and past or future actions. One such prohibition is on the Member's employment as a consultant or otherwise by the Employer, the Contractor, the Employer's Personnel or the Contractor's Personnel for a certain period prior to the signing of the DAAB Agreement.

In the original version of RB2017 and YB2017, that period was ten years. FIDIC has since taken the opportunity to review the limits of this prohibition. In this regard, FIDIC has duly noted the published guidance of the International Bar Association<sup>2</sup> concerning the significance of prior services by an arbitrator for one of the parties or other involvement in the case, or relationship with a counsel of a party in the arbitration, within a preceding period of (only) three years; or an arbitrator being a former judge who has heard a significant case involving one of the parties or an affiliate of one of the parties. FIDIC has also recognised the role that prior disclosure might play in avoiding any real or perceived '*imbalance within*' the DAAB.

Accordingly, FIDIC has amended Sub-Clause 4.1, paragraph (c) to reduce the '*relation period*' for prior employment, from ten years to five years and to create an exception to the

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<sup>2</sup> See IBA Guidelines on Conflicts of Interest in International Arbitration (2024), s. (3).

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prohibition where the circumstances of prior employment were disclosed in writing to the Employer and the Contractor before they signed the DAAB Agreement (or are deemed to have done so).

FIDIC's concern for due access to an adequate body of available DAAB Members is evident here. Accordingly, the circumstances that might preclude a would-be arbitrator from accepting a referral, or at least oblige him or her to disclose the material circumstances, are not applied with equal stringency to a would-be DAAB Member.

## **V. The clarifications**

### **(1) Performance Security 'Guaranteed Amount' adjustments**

The third paragraph of Sub-Clause 4.2.1 [*Contractor's obligations*] envisages that the Contractor will cause the 'amount of the Performance Security' to be increased or decreased in the event that Variations and/or adjustments under Clause 13 [*Variations and Adjustments*] result in an accumulative increase or decrease (respectively) of the Contract Price.

The way in which any changes in the Contract Price should be measured in circumstances where it is denominated in more than one currency seems to have been unclear. Would changes in foreign exchange buy and/or sell rates be regarded as a change in itself? It would seem not. Accordingly, FIDIC has sought to address this by the addition of the words:

- 'in one currency' in the third line of the last paragraph of Sub-Clause 4.2.1, after 'increase or decrease of the Contract Price'; and
- 'in that currency' in the last line of the last paragraph of Sub-Clause 4.2.1, after 'Accepted Contract Amount'.

### **(2) Constructive taking-over**

The first paragraph of Sub-Clause 10.2 [*Taking Over Parts*] empowers the Engineer to issue a Taking-Over Certificate for any part of the Permanent Works. The second paragraph thereof then, on one hand, prohibits the Employer's use of any part of the Works (other than as a temporary measure,

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which is either specified in the Employer's Requirements or with the prior agreement of the Contractor) unless and until the Engineer has issued a Taking-Over Certificate for this part, yet, on the other hand, provides for what occurs if this prohibition goes unrecognised.

If the Employer does use any part of the Works before the Taking-Over Certificate is issued, then the Contractor must give a Notice to the Engineer identifying such part and describing such use, and [inter alia] '*... (a) that Part shall be deemed to have been taken over by the Employer as from the date on which it is used[.]*' Further obligations arise in this circumstance, including, by force of the third paragraph of Sub-Clause 10.2, that the '*Contractor shall be given the earliest opportunity to take such steps as may be necessary to carry out the outstanding work (including Tests on Completion) and/or remedial work for any defects listed in the certificate.*'

By way of clarification only, FIDIC has modified the third and fourth paragraphs of the original text of Sub-Clauses 1.1.58 [Part], 10.1 [Taking Over the Works and Sections] and 10.2 [Taking Over Parts] to recognise that the partial taking over by the Employer might either be expressed in a Taking-Over Certificate or be constructive (i.e., 'deemed') by means of the Employer's use of any part as aforementioned.

### **(3) Partial certification of the content of an application for final certification deemed an IPC**

The Contractor's entitlement to final payment depends on two main preconditions. Firstly, the Engineer's issuance of the Final Payment Certificate in accordance with Sub-Clause 14.7 [Payment]. Secondly, in all cases, the Contractor must have submitted or be deemed to have submitted a discharge under Sub-Clause 14.12 [Discharge].

FIDIC envisages that, subject to only two exceptional circumstances, the Engineer will issue the Final Payment Certificate under Sub-Clause 14.13 [Issue of FPC] for the amount that s/he can verify and justify, even if:

- (a) s/he needs to make a correction to the Contractor's application for final payment in the Final Statement or the Partially Agreed Final Statement;

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- (b) s/he does not agree with any of the amounts that the Contractor has included; or
  - (c) the Contractor has not submitted a draft final Statement in time under Sub-Clause 14.11.1 [*Draft Final Statement*] and has still not done so ‘*within a period of 28 days*’ as stated in the second paragraph of Sub-Clause 14.13, after the Engineer/Employer has requested the Contractor to do so.

FIDIC has, by way of the relevant amendments, sought to clarify that the two exceptional circumstances in which the Final Payment Certificate under Sub-Clause 14.13 is not expected to be issued are where the Contractor has not submitted the discharge required under Sub-Clause 14.12 but has submitted either:

- (a) a Partially Agreed Final Statement; or
- (b) a draft final Statement, part of which the Engineer/Employer is satisfied can be deemed to be a Partially Agreed Final Statement.

FIDIC’s stated intention is that in either of these alternative circumstances, instead of issuing the Final Payment Certificate under Sub-Clause 14.13, the Engineer will proceed in accordance with Sub-Clause 14.6 by issuing an Interim Payment Certificate. In both circumstances, the first ground for deeming the submission of the discharge and its effectiveness, under Sub-Clause 14.12 – namely, the full payment of the amount certified in the Final Payment Certificate – will exist.

The original version of the third paragraph of Sub-Clause 14.13 of RB2017, YB2017 and SB2017 appeared to reflect this intention; however, it was not completely clear that the issuance of an Interim Payment Certificate would be expected in the absence of a discharge. FIDIC has sought to make this clear by means of the amendment to be made to the third paragraph of Sub-Clause 14.13.

#### **(4) Preparation and award writing included in the daily fee**

FIDIC had noticed an appreciable degree of uncertainty among users of the FIDIC Rainbow Suite (First Editions) regarding the scope of a DAAB Member’s daily fee. In this regard, according to the original text:

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- (a) sub-paragraph (iv) of paragraph (b) of Sub-Clause 9.1 [*Fees and Expenses*] refers to a day spent (inter alia) ‘*preparing decisions*’; and
  - (b) sub-paragraph (v) of paragraph (b) of Sub-Clause 9.1 refers to a day spent ‘*in preparation for a hearing, and studying written documentation and arguments from the Parties submitted in accordance with sub-paragraph (c) of Rule 7.1 of the DAAB Rules*’.

The borderline between ‘*preparing decisions*’ and ‘*studying written documentation and arguments from the Parties submitted in accordance with sub-paragraph (c) of Rule 7.1 of the DAAB Rules*’ was unclear. The latter seemed to be a subcategory of the former. In order to be clearer about this, FIDIC has now explicitly referenced in sub-paragraph (b) (v) the preparation of the decision in lieu of the preparation for a hearing, which is to be added to sub-paragraph (b)(iv). While amending sub-paragraph (b)(v), FIDIC has also taken the opportunity to remove the qualifying words ‘*submitted in accordance with sub-paragraph (c) of Rule 7.1 of the DAAB Rules*’, presumably because the studying of written documents and arguments warrants the payment of a fee whether or not those documents and arguments have been submitted in response to a request of the DAAB.

## **(5) The use of the internet**

Finally, FIDIC has reviewed the uses of various technological media systems and come to the view that internet-based video calls are being used in abundance. Since these internet-enabled communications are more publicly available and economical to operate than telephonic systems, FIDIC has evidently taken the view that DAAB Members ought to be encouraged to prefer those systems. Therefore, FIDIC has narrowed the scope of the reimbursable expenses associated with communication systems by amending the original text of paragraph (c) of Sub-Clause 9.1 [*Fees and Expenses*] and Rules 2.1, 3.4, 3.6 and 3.9 to delete the references to telephone calls and video conference calls.

FIDIC has, however, expressed a desire for DAABs to engage with the Parties through regular face-to-face meetings and Site visits even if they are now less popular than they were prior to 2020. This is expressed in a pair of sentences added beneath Rule 3.3 which envisage that the

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meetings (beyond the introductory meeting) ‘*shall*’ be face-to-face and that each Site visit ‘*shall*’ be in-person ‘*unless the Parties and the DAAB agree that exceptional circumstances mean that it would be prudent for the meeting and Site visit to be carried out online*’.

## **VI. Conclusion**

FIDIC intends that Amendments No. 3 will ‘*become effective*’ – that is, be available for inclusion in bidding documents as from 1 January 2023. Going forward, Parties that are considering draft contracts that reference the FIDIC 2017 Second Editions ought to check whether they are expressly incorporated by reference to the original or revised versions thereof.

In the foreword to the First Edition of this book, Sir Vivian Ramsey expressed some degree of surprise that noticeable developments in the enforceability of statutory determinations by courts combined with the emergence of international commercial courts have not led to the carving-out of DAAB decisions from the arbitration regime in favour of direct court enforcement. Perhaps, as a starting point, this might be achieved by means of a non-exclusive choice of forum clause.

\*

## **New features of this book**

With the addition of coverage of GB2021, the need arose to reproduce useful extracts thereof in like vein to those reproduced for RB2017, YB2017 and SB2017. That need has been met and all appendices to this second edition of the book are available to the purchasers of each copy as supplementary material. Book purchasers will be able to access this material by emailing [booksales@emerald.com](mailto:booksales@emerald.com) with proof of purchase. This additional content includes extracts from the Yellow Book, FIDIC guidelines for DAB appointments, the ICC mediation rules and extracts from the Green Book.

One of the several items of helpful feedback received on the first edition of this book raised the question whether the introduction of worked illustrations of the procedural works of the FIDIC 2017 suite might help users who are wrestling with the administration of contracts incorporating RB2017, YB2017 or SB2017 without material changes: ‘*Show, don’t*

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*tell'*. With that very helpful suggestion in mind, and perhaps flouting convention – which would see me inventing fictitious project characters and offering a blow-by-blow account of their commercial journey – the illustrations are concise, if somewhat sterile; in each of the Figures [1.3] [The process for the formation of a sole-Member DAAB], [1.6] [The objection procedure], [3.1] [The notification of a specific event or circumstance], [3.2] [The time for giving a Notice of Claim for Payment and/or an extension], [3.3] [The time for giving a Notice of Claim for any entitlement or relief other than payment and/or an extension], [3.5] [Notice of Claim procedure under RB2017 and SB2017], [3.6] [The fully detailed Claim procedure under RB2017 and YB2017], [4.2] [The timing of Engineer's Notices under RB2017 and YB2017], and Figure [13.1] [The pre-arbitral steps], the reader will find worked illustrations of the procedure under YB2017 (it being a popular choice of model Conditions of Contract among the suite) grounded (as necessary and expressed) upon certain assumptions as to the operation of applicable laws.

Finally, this second edition references a plethora of legal and quasi legal materials that have emerged since 15 November 2021.

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## Preface to the first edition

This book aims to provide a detailed, procedurally focused account of the provisions of the FIDIC Second Editions that regulate the inception and resolution of Claims and other matters that are particularly prone to disputation. I have sought to produce a result that is both introductory and practical, without shying away from the inherent complexity of the subject.

The subject matter comprises an extensive body of information that would prove challenging to cover with pleasing consistency. Consequently, this book seeks not to introduce the FIDIC Second Editions comprehensively. Nor does it seek to offer a gratuitous account of the many noticeable points of evolution from earlier model contracts published by FIDIC, however inherently interesting that historical perspective may be. Only where, and to the extent, it is thought useful for the new reader to be afforded such an account is one attempted. For instance, the development of the ‘special measures’ powers of the DAAB (Dispute Avoidance/Adjudication Board) regarding the orders of an emergency arbitrator is explained briefly as an aid to understanding the now overlapping regime.

The provisions governing the finally binding resolution of a dispute by means of arbitration form no less a feature of the dispute resolution provisions than those governing the provisionally binding adjudication. Yet, to date, the workings of the default rules of arbitration, the ICC Arbitration Rules, are seldom tackled in any systematic fashion in the specialist commentaries covering the FIDIC Second Editions (or indeed their predecessors). That is quite understandable in view of the scale and complexity of the topic of commercial arbitration and the availability of other commentaries that are entirely focused on those rules. Nonetheless, it is hoped that a more holistic, systematic coverage of the topic will afford the reader a better perspective of the procedures. That said, in the interests of proportionality, the reader will not find in the pages of Chapter 13 the deepest available analysis of the ICC Arbitration Rules. The features of that system are surveyed in greater detail in numerous other specialised texts, as listed in the bibliography. As with the other mechanisms concerned with claims and disputes, there is no

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attempt to render a gratuitous account of how the ICC rules and practices have evolved over time.

One aim of the FIDIC Second Editions was improved dispute avoidance.<sup>3</sup> Another was increased clarity and certainty for users whose first language is not English,<sup>4</sup> including in the claims and dispute avoidance and resolution processes. Admittedly it ‘*was always likely to result in more prescription and complexity*’.<sup>5</sup> This text seeks to lay out those processes in a logical sequence reflecting the life of a Claim, from the cradle to the grave as it were. In practice, of course, one would aspire to Claims that can be accepted and discharged appropriately without dispute; however, the whole apparatus of the Conditions assumes that not all Claims will lead such a charmed life.

When studying the Second Editions there are several practical realities warranting consideration. These include, firstly, that, except in those jurisdictions where construction contracts are regularly drawn up based on a FIDIC model contract and whose forum courts<sup>6</sup> are regularly dealing with disputes arising thereunder (a good example of which being South Africa) and observe the doctrine of precedent, there are no binding case authorities in this area. The publicly available cases are reasoned on the basis of a diversity of ‘applicable rules’, and/or traditions, and in the context of substantially modified model FIDIC Book provisions. That is not to say that the published decision of a court or arbitral tribunals<sup>7</sup> will never be taken account of. In the real world they often are. But they cannot be binding<sup>8</sup> nor are they exclusive sources of guidance for a decision-maker faced with substantively identical material facts or the workings of the same model contractual mechanism.

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<sup>3</sup> Godwin 2020, p. xv.

<sup>4</sup> *Ibid.*, p. xiii.

<sup>5</sup> *Ibid.*, p. xv.

<sup>6</sup> A forum court is the place of eventual enforcement of an award; see paragraph 1640 in Chapter 13.

<sup>7</sup> These are published as excerpts, summaries and translations in the *ICC International Court of Arbitration Bulletin*, the *Yearbook Commercial Arbitration*, *Journal du droit international*, *The Paris Journal of International Arbitration/Les Cahiers de l'Arbitrage*, *Revista de dercho internacional y del Mercosur/Revista de Dereito Internatiocional e do Mercosul*, *SchielsVZ*, *Journal of Arab Arbitration*. Some of those awards concerned with the workings of DABs under the FIDIC First Editions are conveniently extracted in anonymised form in the *ICC Dispute Resolution Bulletin 2015*, Issue 1.

<sup>8</sup> Gaillard and Banifatemi, 2008, pp. 40–43.

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Secondly, when compared with the judicial heritage of other domestic model industry forms, such as the publications of the American Institute of Architects, the Canadian Construction Documents Committee, the German Procurement Committee for Construction Works, the Joint Contracts Tribunal in the United Kingdom and Standards Australia, it is quite apparent that the volume of published decisions and reasoned awards is miniscule. As a result, it would be somewhat ambitious for anyone to draw fixed conclusions from the available materials. Nonetheless, they offer a rich source of information on possible outcomes, albeit not universally binding conclusions.

Thirdly, there is a notable, albeit rather nuanced, diversity of criteria spanning the three neutral decision-making stages of dispute resolution – the determination of the Engineer (in the case of RB2017 and SB2017) or the Employer’s Representative (in the case of SB2017) (see Chapter 6); a decision of the DAAB (see Chapter 10); and an award of the arbitral tribunal under Article 21 of the ICC Rules of Arbitration (see Chapter 13).

Each of these three aspects of non-uniformity leaves the FIDIC Contracts Committee, and the producers of the various translations of the FIDIC Second Editions, saddled with a serious responsibility to achieve a level of clarity of arrangement and composition that can withstand the relative dearth of critical exegeses. When promulgating the Second Editions in December 2017, was FIDIC acting in a quasi-legislative capacity? I caution against the acceptance of this inference. Without doubt, the FIDIC Second Editions will enable a degree of consistency in the successive interpretation of common provisions thereof, as is their manifest purpose. To quote VK Rajah JA, delivering the judgment of the SGCA in *KS Energy Services Ltd v. BR Energy (M) Sdn Bhd*:<sup>9</sup>

*Since any contract is a consensual arrangement between particular parties made against the background of particular circumstances, it is not difficult for the court to distinguish a previous court decision on the meaning of a particular phrase when a similar phrase is used in a different contract based on a different set of circumstances. Notwithstanding this, decisions on the meaning and effect of certain*

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<sup>9</sup> [2014] SGCA 16.

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*commonly-used phrases provide authoritative guidance on the prima facie meaning of similar phrases when they are used in documents that are intended to have legal effect. This is especially so because the contracting parties would have taken into account the general law in reaching their agreement. Furthermore, attributing such prima facie meanings to similar phrases (ie, phrases similar to commonly-used phrases) promotes commercial certainty. Hence, unless there is a contrary and objectively-ascertained intention on the part of the parties, the court will generally assume that in using similar phrases in their contract, the parties intended these phrases to bear their prima facie meaning.<sup>10</sup>*

And yet the promotion of commercial certainty need not sacrifice party autonomy, which calls for an individualised interpretation of a FIDIC model. To quote the unanimous observations of the SFT in *A. \_\_\_\_\_ SA v. B. \_\_\_\_\_ SA*:<sup>11</sup>

*The General Conditions established by [FIDIC] are admittedly akin to rules of law, which may sometimes justify objective interpretation and taking into consideration the opinion of their author as to the meaning of the words they contain. However, they were established by a private law organization and the court in charge of applying them will have the last word and provide individualized interpretation appropriate to the circumstances of the case at hand to the extent possible.<sup>12</sup>*

An attempt to balance these conflicting values is apparent in the decision of the HCK in *Ongata Work Limited v. Tatu City Limited*,<sup>13</sup> in which the court favoured the avoidance of interpretative criteria ‘which may lead to undesirable commercial uncertainty unless it is to ensure that the ideals of justice are ultimately met’.<sup>14</sup>

While this book has 14 chapters, its structure may be viewed as comprising seven parts. Chapter 1 introduces the DAAB, by default a standing board with the primary,

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<sup>10</sup> *Ibid.*, [45].

<sup>11</sup> 4A\_124/2014 (official English translation).

<sup>12</sup> *Ibid.* See Lumbwe, 2020, p. 459.

<sup>13</sup> Unreported, High Court of Kenya, Civil Suit No. 504 of 2017 (31 January 2018).

<sup>14</sup> *Ibid.*, [58].

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though not sole, mission of avoiding and managing Disputes between the Parties. Chapters 2 and 3 introduce the Claim, its meaning and genesis. Chapters 4 and 5 seek to explain how the Claim might be resolved amicably and practically. Chapters 6 and 7 address the possible resolution of the Claim by means of a determination. Chapters 8 to 11 introduce the Dispute and describe the process by which it may be resolved by means of the adjudicative function of the DAAB. Chapter 12 returns to the theme of Chapters 4 and 5, explaining how, following a relevant decision of the DAAB, the Dispute might be resolved amicably and practically. Lastly, Chapters 13 and 14 explain the last resort, final resolution of the Dispute by means of commercial arbitration under the auspices of the ICC Court.

The glossary and bibliography are as full as I could make them. Whereas the bibliography might serve as a current body of useful reference materials, the glossary enables a simplification of the main text while explaining difficult, technical or unusual terms, especially legal jargon, for which non-lawyers need an explanation.

The FIDIC Second Editions capitalise a whole host of terms and expressions that are defined in Sub-Clause 1.1 and/or the Dispute Avoidance/Adjudication Agreement. Where a term or expression is so capitalised, I have adopted that form. On the other hand, other materials referenced (and in some cases quoted) do not concern the FIDIC Second Editions and so do not reflect those capitalisations exactly or at all. That is largely why the reader will note that some common terms and expressions are not always capitalised herein. Where I have referenced clauses and sub-clauses without specifying any one or more of the FIDIC Second Editions, I am referring to all of them.

I have adopted the Harvard citation style, in compliance with the requirements of my publisher, which has avoided the ubiquitous spectacle of dense footnotes. However, that is at the price of some degree of disjuncture within the main text in places, which I have sought to keep to a minimum while giving due acknowledgement to relevant reference materials.

I have preferred the Shorter Oxford English Dictionary (2007) over the other leading dictionaries, purely in the interests of consistency.

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The overriding point arising from the preceding introductory text is that, of course, language matters. This text addresses the English version of the Second Editions and the English translations of those reference materials that are not expressed primarily in English.

I am grateful to my publisher, Dr Michael Fenton, and my colleague, Andrea Utasy Clark, for comments on the manuscript and for the generosity of my colleagues Melissa Heng, LLB (Hons) (SMU) and Tan Bae Huey, BEng (Hons) (NTU) and JD (SMU) for the meticulous translating of my footnotes into Harvard-style references and well-organised tables of international authorities. Where there has never been delay but only efficiency, is the contribution of my personal assistant, Elina Tan, for formatting the manuscript – numerous times in and around my tinkering – to comply with the ICE publishing guidelines, and for improving the numerous figures. I wish to express my gratitude to my former colleague, James Lewis, LLB (KCL), PCLL (HKU), MSc (KCL), LLM (CU), for agreeing to the republication, in Chapter 14, of our article ‘Game of Thrones: A Narrowing Immunity?’<sup>15</sup> In like vein, I wish to express my appreciation for the generosity of my colleague, Yong Neng Chan, LLB (Hons) (NUS), MSIArb, for consenting to the substantive republication of our article ‘The ICC Commission Report, Construction Industry Arbitrations Recommended Tools and Techniques for Effective Management (2019 Update)’.<sup>16</sup> Last but by no means least, I wish to acknowledge my affection and gratitude to my wife, Yuko Shimizu, for her unfailing patience and toleration of my untold hours of hermitic semi-presence, as author; layered upon a baseline of domestic eremitism as a practising private international lawyer. The ‘zero Covid’ policy settings of the government of the Republic of Singapore have, somewhat mercifully, enabled much of the later phases of reclusiveness to be played out under the same roof.

While every effort has been made to ensure that the information contained in this publication is correct, any errors therein are my sole responsibility. The views expressed are my own and not necessarily those of others with whom I am professionally associated.

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<sup>15</sup> Brown and Lewis, 2013.

<sup>16</sup> Brown and Chan, 2019, p. 455.

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## Acknowledgements

I am again grateful to my publisher, Dr Michael Fenton, Cathy Sellars, and their highly professional team at Emerald Publishing; to Sir Robert Akenhead for his thoughtful foreword; and to my colleague, Kerry Higgins, for comments on the manuscript. Writing the second edition involved genuinely unexpected asceticism, and so I again acknowledge with affection and gratitude my wife's unfailing patience and toleration. Gratefully, I have achieved my target of completing the manuscript in mid Spring 2024.

While every effort has been made to ensure that the information contained in this publication is correct (as at 1 April 2024), any errors therein are my sole responsibility. The views expressed are my own and not necessarily those of others with whom I am professionally associated.

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# Glossary

Following is a glossary of terms, expressions, abbreviations and acronyms that are adopted or introduced in this text for convenience. The definition of words and expressions set forth in Sub-Clause 1.1 of RB2017, YB2017 and SB2017 is not reproduced herein and those words and expressions, when used in this text, bear the same meaning as they do when used in RB2017, YB2017 and SB2017, with any specific differences between RB2017, YB2017 and SB2017 specifically indicated.

AAA Rules	The American Arbitration Association's Construction Industry Arbitration Rules and Mediation Procedures – Including Procedures for Large, Complex Construction Disputes (2015)
ADR	Alternative dispute resolution
Amendments No. 3	Amendments Issue No.3 – November 2022 (Amendments to the FIDIC Conditions of Contract for Construction Second Edition 2017 and/or Amendments to the FIDIC Conditions of Contract for Plant and Design-Build Second Edition 2017 and/or Amendments to the FIDIC Conditions of Contract for EPC/ Turnkey Projects Second Edition 2017) as the context permits
CD	Cambridge Dictionary©, Cambridge University Press 2020
CdA	La Cour d'appel (English: Court of Appeal) (France)
CdC	La Cour de cassation (English: Supreme Court) (France)
CIArb	Chartered Institute of Arbitrators, a charity incorporated by Royal Charter and registered at the Charity Commission of England and Wales under number 803725
Circ.	The nominated regional judicial circuit of the United States Court of Appeals for the Federal Circuit

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CISG	United Nations Convention on Contracts for the International Sale of Goods, Vienna, 11 April 1980, S. Treaty Document Number 98-9 (1984), UN Document Number A/CONF 97/19, 1489 UNTS 3
Comm.	The Commercial Court, of the King's Bench Division of the High Court of Justice
<i>compromissum</i>	A submission to arbitration
the Conditions of Contract	the Conditions 'Conditions of Contract', defined in Sub-Clause 1.1.8 of RB2017, YB2017 and SB2017 as follows: "Conditions of Contract" or "these Conditions" means these General Conditions as amended by the Particular Conditions.' Also, as the context requires 'Conditions of Contract' as defined in Sub-Clause 1.1.5 of GB2021
Contractor's Proposal	The document entitled 'proposal' which the Contractor submits with the Letter of Tender, as included in the Contract
Convention on Immunities	The United Nations Convention on Jurisdictional Immunities of States and their Property as adopted during the 65th plenary meeting of the General Assembly by resolution A/59/38 of 2 December 2004
CSIH	The Inner House of the Scottish Court of Session
CSOH	The Outer House of the Scottish Court of Session
DAA	Dispute Adjudication Agreement in the FIDIC First Editions; the equivalent of the DAAB Agreement in the FIDIC 2017 Second Editions.
DAAB	The Dispute Avoidance/Adjudication Board, the sole Member or three Members (as the case may be) so named in the Contract, or appointed under Sub-Clause 21.1 [ <i>Constitution of the DAAB</i> ] or Sub-Clause 21.2 [ <i>Failure to Appoint DAAB Member(s)</i> ]

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DAAB Agreement	DAAB Agreement defined in Sub-Clause 1.1.23 of RB2017 and YB2017 and Sub-Clause 1.1.20 of SB2017
DAAB Rules/ DAAB Procedural Rules	The Procedural Rules annexed to the General Conditions of Dispute Adjudication Agreement, which are in turn appended to the FIDIC 2017 Second Editions
DAAB Rules (Silver)/DAAB Procedural Rules (Silver)	The DAAB Procedural Rules annexed to SB2017
DAB	Dispute Adjudication Board
DBF DAB Rules	The Dispute Board Federation Dispute Adjudication Board Ad Hoc Rules for Use in Independently Administered Dispute Board Matters
DCC	Dubai Court of Cassation
DIFC CA	The Dubai International Financial Centre Courts, Court of Appeal
DNP	Defects Notification Period
ECA	The English Court of Appeal
EIC Guide	EIC (European International Contractors) Contractor's Guide to the FIDIC Conditions of Contract for Plant and Design-Build
Engineer's Representative	The person who may be appointed by the Engineer under Sub-Clause 3.3 [ <i>Engineer's Representative</i> ] of RB2017 or YB2017
EOT	Extension of the Time for Completion
estoppel	The principle which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person or by a previous pertinent judicial determination (OED)
Ex Ch	The Exchequer of Pleas or Court of Exchequer in England and Wales
FCC	Federal Court of Canada

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FIDIC	The international federation of national member associations of consulting engineers known in English as the International Federation of Consulting Engineers, founded in 1913 and headquartered in Geneva, Switzerland
FIDIC Contracts Committee	FIDIC's Contracts Committee, including the Updates Special Group and Update Task Groups
FIDIC First Editions Guide 2000	FIDIC Contracts Guide to the Construction, Plant and Design-Build and EPC/Turnkey Contracts (First Edition, 2000)
FIDIC Second Editions Guide 2022	FIDIC Contracts Guide to the Construction, Plant and Design-Build and EPC/Turnkey Contracts (Second Edition, 2022)
FIDIC First Editions	FIDIC Red 1999, FIDIC Yellow 1999 and FIDIC Silver 1999
FIDIC Gold 2008	Conditions of Contract for Design, Build and Operate Projects (First Edition, 2008)
FIDIC Gold 2008 Guide	FIDIC DBO (2008 Gold Book) Contract Guide 1st Edition
FIDIC Golden Principles	The FIDIC Golden Principles (First Edition 2019)
FIDIC Orange 1st	Conditions of Contract for Design-Build and Turnkey (First Edition, 1995)
FIDIC Pink 2005	Conditions of Contract for Construction (Multilateral Development Bank Harmonised Edition, Version 1: May 2005)
FIDIC Red 1999	Conditions of Contract for Construction (First Edition, 1999)
FIDIC Red 2017	Conditions of Contract for Construction (Second Edition, 2017), published by FIDIC

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FIDIC Red 2017 Guidance	Guidance on the Preparation of Particular Conditions, forming part of RB2017, published by FIDIC
FIDIC Red 4th	Conditions of Contract for Works of Civil Engineering Construction (Fourth Edition, 1987), published by FIDIC
FIDIC 2017 Editions	RB2017, YB2017 and SB2017
FIDIC 2017 Editions Guidance	RB2017 Guidance, YB2017 Guidance and SB2017 Guidance
FIDIC Silver 1999	Conditions of Contract for EPC/ Turnkey Projects (First Edition, 1999), published by FIDIC
FIDIC Silver 2017 Guidance	Guidance on the Preparation of Particular Guidance Conditions, forming part of SB2017, published by FIDIC
FIDIC Yellow 1999	Conditions of Contract for Plant and Design Build First Edition, 1999), published by FIDIC
FIDIC Yellow 2017 Guidance	Guidance on the Preparation of Particular Conditions, forming part of YB2017, published by FIDIC
FIDIC Yellow 3rd	Conditions of Contract for Electrical and Mechanical Works (Third Edition, 1987), published by FIDIC
FPC	Final Payment Certificate; issued by the Engineer (in the case of RB2017 and YB2017) under Sub-Clause 14.13 [ <i>Issue of FPC</i> ]
GB2021 (known colloquially as 'the Green Book')	FIDIC Short Form of Contract (Second Edition 2021)
GC of DA	General Conditions of DAAB Agreement
Geneva Convention	Geneva Convention on the Execution of Foreign Arbitral Awards of 1927

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Geneva Protocol	Protocol on Arbitration Clauses, signed at Geneva on 24 September 1923
HCI	The High Court of Justice of England and Wales
HCK	The High Court of Kenya
HCN	The High Court of Namibia
HCS	The Supreme Court of Singapore, High Court
HCSA	The High Court of South Africa
HGCRA	<i>Housing Grants, Construction and Regeneration Act 1996 (Chapter 53)</i> of the Parliament of the United Kingdom of Great Britain and Northern Ireland
HKCA	The Court of Appeal of the High Court of the Hong Kong Special Administrative Region of the People's Republic of China
HKCFA	The Court of Final Appeal of the High Court of the Hong Kong Special Administrative Region of the People's Republic of China
HKHC	The High Court of the Hong Kong Special Administrative Region of the People's Republic of China
HKSAR	The Hong Kong Special Administrative Region of the People's Republic of China
IBA	International Bar Association
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration, 2020
IBA Toolkit for Award Drafting	IBA Arb40 Subcommittee Toolkit for Award Writing
ICC	The International Chamber of Commerce, founded in 1919 and headquartered in Paris, France
ICC Court	The ICC International Court of Arbitration

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ICC Dispute Board Rules	Dispute Board Rules of the International Chamber of Commerce in force as from 1 October 2019, with Appendices in force as from 1 October 2018
ICC Guide on Effective Management	Effective Management of Arbitration — A Guide for In-House Counsel and Other Party Representatives (2018)
ICC President	The President of the ICC Court
ICC Rules of Arbitration	Arbitration Rules of the International Chamber of Commerce in force as from 1 January 2021
ICC Secretariat	The Secretariat of the ICC Court, the ‘engine room’ of the ICC Court, responsible for relations with the arbitrators and parties in the cases assigned to them, the supervision of case management and other administrative tasks
INDLHC	High Court of Delhi at New Delhi, India
Instructions to Tenderers	<p>A document issued to prospective tenderers that normally includes Instructions to Tenderers, the Letter of Tender, Conditions of Contract and data on hydrological and sub-surface conditions at the Site, studies on environmental impact, and reports on any other investigations initiated by the Employer.</p> <p>For RB2017 and YB2017, the Instructions to Tenderers will also normally include an Appendix to Tender, Schedules and the Employer’s Requirements.</p> <p>For RB2017, the Instructions to Tenderers will also include the Specification and Drawings.</p>
LCIA	The London Court of International Arbitration
LCIA Rules <i>lex arbitri</i>	LCIA Arbitration Rules (2014) The procedural law of the arbitration

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<i>lex electionis</i>	The law chosen by the Parties to govern the arbitration agreement/clause
<i>lex executionis</i>	The law of the place of enforcement of the award
<i>lex fori</i>	The law of the territory in which the court (known as the ‘forum court’) is situated
<i>lex loci arbitri</i>	The law of the place (or seat) where the arbitration takes place
Model Law	Model Law on International Commercial Arbitration of the United Nations Commission on International Law <sup>17</sup> (United Nations, 1985)
New York Convention	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards <sup>18</sup> (United Nations, 1958)
NOD	Notice of Dissatisfaction; the Notice one Party may give to the other Party if it is dissatisfied, either with an Engineer’s determination under Sub-Clause 3.7 [ <i>Agreement or Determination</i> ] or with a DAAB’s decision under Sub-Clause 21.4 [ <i>Obtaining DAAB’s Decision</i> ]
Notice	In the case of RB2017, YB2017 and SB2017, a written communication identified as a Notice and issued in accordance with Sub-Clause 1.3 [ <i>Notices and Other Communications</i> ]
NSWCA	The New South Wales Court of Appeal, of the NSWSC
NSWSC	The Supreme Court of New South Wales, of the State of New South Wales, Australia
NZCA	The Court of Appeal of New Zealand
NZHC	The High Court of New Zealand

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<sup>17</sup> Official Records of the United Nations General Assembly, 40th Session, Supplement No. 17 (A/40/17), annex I.

<sup>18</sup> 330 UNTS 38; 21 UST 2517; 7 ILM 1046 (1968) Cmnd 6419.

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OED	Shorter Oxford English Dictionary, Oxford University Press, 2007, MSDict Viewer Version 10.0.17.169
Prague Rules	Rules on the Efficient Conduct of Proceedings in International Arbitration (2018)
QSC	The Supreme Court of Queensland, of the State of Queensland, Australia
RB2017	Conditions of Contract for Construction (Second Edition, 2017), published by FIDIC
RB2017 Guidance	Guidance on the Preparation of Particular Conditions, forming part of RB2017, published by FIDIC
<i>res judicata</i>	A matter that has been adjudicated by a competent court and therefore may not be pursued further by the same parties
Rules for Adjudication	The <i>Appendix: Rules for Adjudication</i> forming part of the General Conditions of GB2021
SASC	The Supreme Court of South Australia, of the State of South Australia
SB2017	Conditions of Contract for EPC/ Turnkey Projects (Second Edition, 2017), published by FIDIC
SB2017 Guidance	Guidance on the Preparation of Particular Guidance Conditions, forming part of SB2017, published by FIDIC
SCASA	The Supreme Court of Appeal of South Africa
SCI	The Supreme Court of India
SCK	Supreme Court of Korea
SCL UK Protocol	The Society of Construction Law Delay and Disruption Protocol, 2nd Edition
SCN	The Supreme Court of Namibia
SCP	Supreme Court of the Republic of the Philippines
SCRK	The Supreme Court of the Republic of Korea
SCS	The Supreme Court of Sweden

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SFT	First Civil Law Division of the Federal Supreme Court of Switzerland, also known as the Swiss Federal Tribunal
SGCA	The Supreme Court of Singapore, Court of Appeal
SIAC Rules	Arbitration Rules of the Singapore International Arbitration Centre
SICC	Singapore International Commercial Court
Singapore Convention	United Nations Convention on International Settlement Agreements Resulting from Mediation <sup>19</sup> (United Nations, 2019)
TCC	The Technology and Construction Court, of the King's Bench Division of the High Court of Justice (England and Wales)
TTHC	The High Court of Justice of The Republic of Trinidad and Tobago
UHC	The High Court of Uganda
UK Arbitration Act	<i>Arbitration Act 1996 (Chapter 23)</i> of the Parliament of the United Kingdom of Great Britain and Northern Ireland
UKHL	The Appellate Committee of the House of Lords of the United Kingdom
UKPC	The Judicial Committee of His Majesty's Most Honourable Privy Council, commonly known as the Privy Council of the United Kingdom
UKSC	The Supreme Court of the United Kingdom
UNCITRAL	The United Nations Commission on International Trade Law
UNIDROIT 2004	International Institute for the Unification of Private Law UNIDROIT Principles of International Commercial Contracts 2004

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<sup>19</sup> Official Records of the General Assembly of the United Nations, 73rd Session, Supplement No. 17 (A/73/17), para 49, annex I.

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UNIDROIT 2010	International Institute for the Unification of Private Law UNIDROIT Principles of International Commercial Contracts 2010
UNIDROIT 2016	International Institute for the Unification of Private Law UNIDROIT Principles of International Commercial Contracts 2016
VSC	The Supreme Court of Victoria of the State of Victoria, Australia
VSCA	VSC, Court of Appeal
WBSBD(W) (January 2021)	Standard Bidding Documents – Procurement of Works (For use with a bidding process where the Bank’s Disqualification mechanism for non-compliance with Sexual Exploitation and Abuse (SEA) and Sexual Harassment (SH) obligations applies), published by The World Bank in January 2021
YB2017	Conditions of Contract for Plant and Design Build (Second Edition, 2017), published by FIDIC
YB2017 Guidance	Guidance on the Preparation of Particular Conditions, forming part of YB2017, published by FIDIC
ZASCA	The Supreme Court of Appeal of the Republic of South Africa

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## Chapter 1

# The Dispute Avoidance/Adjudication Board and the Adjudicator

### Abstract

An introduction to the DAAB concept and its variants; the mode of constitution of a DAAB; its functions and powers; the obligations owed by and to a DAAB's Members, their liabilities and immunities; the mode of resignation and the termination of their engagement; and the ending of the DAAB the approach with regard to GB2021's Adjudicator.

### Introduction

1. The RB2017 (Red Book), YB2017 (Yellow Book) and SB2017 (Silver Book) reflect a marked evolution of the dispute board, newly and aptly termed the 'Dispute Avoidance/Adjudication Board' (or the 'DAAB'). As its name suggests, the more progressive DAAB is designed to assist the Parties in avoiding Disputes, in addition to purely resolving those which cannot successfully be avoided. Clause 21 [*Disputes and Adjudication*] sets out the framework and tools to enable the Parties to meaningfully benefit from this greater practical function of the DAAB throughout the lifespan of their project. The GB2021 (Green Book) incorporates this distinct avoidance function in the role of the 'Adjudicator'.
2. One aspect of the disputes framework that is unique to RB2017, YB2017 and SB2017 is the appointment of a 'standing' DAAB at the start of the Contract, ready to assist the Parties as and when needed (see paragraph 9). This takes the place of the more common ad hoc dispute board, appointed only after a dispute arises and often leading to the appointment of multiple (sequential or concurrent) dispute boards over the life of the project. GB2021's 'Adjudicator' is also intended to be 'standing'. Complementing this updated framework are enhancements to the dispute board's tools, including a new power enabling the DAAB (and in the case of GB2021, the Adjudicator) to provide what may be termed 'informal assistance' to the Parties with the aim of resolving issues or disagreements as and when they arise, well before they progress to Disputes requiring resolution through adjudication, resulting in time and costs savings for the Parties (see paragraphs 92 to 116). Together these features help bring to life the new dispute avoidance function of the DAAB (or Adjudicator, as the case may be) and are intended to offer the Parties a more efficient and real-time means of dispute resolution.
3. This chapter explores these and other key features of the DAAB/Adjudicator and the supporting dispute resolution processes provided for in RB2017, YB2017, SB2017 and GB2021. First, this chapter introduces the concept of

- the DAAB/Adjudicator, its variants, including ‘standing’ and ad hoc DAABs/Adjudicators, and its purpose (see paragraphs 6 to 17). Second, this chapter sets out why the DAAB/Adjudicator is constituted (see paragraphs 18 to 32) and the procedures for the constitution of the DAAB/Adjudicator (see paragraphs 33 to 91). Third, this chapter examines the functions and powers of the DAAB/Adjudicator, with a focus on the resolution of issues or disagreement by means of ‘informal assistance’ (see paragraphs 92 to 116).
4. Fourth, this chapter reviews the DAAB Members’ (and in the case of GB2021, the Adjudicator’s) obligations to the Parties, including in relation to impartiality and independence (see paragraphs 117 to 136), availability (see paragraphs 137 to 139), knowledgeableness (see paragraphs 140 to 144), confidentiality (see paragraphs 145 to 154), meetings with the Parties (see paragraphs 155 to 161), Site visits (see paragraphs 162 to 167), reports of meetings and Site visits (see paragraph 168 to 172) and modes of communication with the Parties and between the DAAB Members/Adjudicator (see paragraphs 173 to 177). Fifth, this chapter explains the powers of the DAAB/Adjudicator (see paragraphs 178 to 194), the Parties’ obligations owed to the DAAB Member(s)/Adjudicator, generally and in the context of the DAAB’s constitution (and in the case of GB2021, the appointment of the Adjudicator) (see paragraphs 195 to 202), the DAAB Agreement/Adjudicator’s Agreement (see paragraphs 203 to 210), the payment of fees, expenses and taxes (see paragraphs 211 to 264) and the conduct of the DAAB’s Activities/Adjudicator’s activities (see paragraphs 265 to 281). Sixth, this chapter briefly summarises the Parties’ obligations to each other (see paragraphs 282 to 284).
  5. Seventh, this chapter outlines the procedures for the challenge of a DAAB Member/Adjudicator (see paragraphs 285 to 302). Eighth, this chapter addresses the cessation of a DAAB Member’s/Adjudicator’s appointment prior to the expiration of the term of the DAAB/Adjudicator, including how this might occur and the consequences thereof (see paragraphs 303 to 328). Ninth, this chapter briefly describes the process for the replacement of a DAAB Member/Adjudicator upon his/her resignation (see paragraphs 329 to 332). Tenth, this chapter discusses the liabilities and immunities of the DAAB Member/Adjudicator, including the general immunity from liability and possible exceptions thereto such as fraud, gross negligence, deliberate default and reckless misconduct (see paragraphs 333 to 372). Eleventh, this chapter considers the ending of the DAAB/Adjudication through four scenarios for the expiration of the term of the DAAB/Adjudication (see paragraphs 373 to 381). Finally, this chapter turns to circumstances in which the DAAB/Adjudicator is absent, whether as a result of the ending of the DAAB’s/Adjudicator’s appointment or otherwise (see paragraphs 382 to 404).

## **What the DAAB/Adjudicator is**

### **Introduction**

RB2017, YB2017 and SB2017

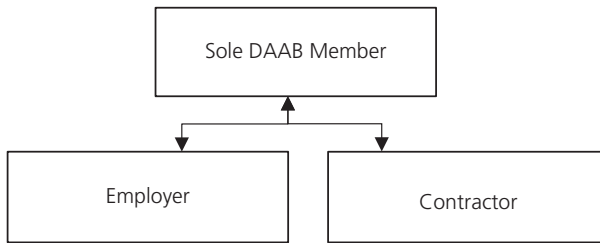
6. In legal terms, a ‘DAAB’ is one set (or three sets) of personal contractual relations involving particular aims, rights and obligations, which may exist among the Employer, the Contractor and another natural person called a ‘DAAB Member’.

Sub-Clause 1.1.22 of both RB2017 and YB2017, and Sub-Clause 1.1.19 of SB2017, define the ‘DAAB’ or ‘Dispute Avoidance/Adjudication Board’ as:

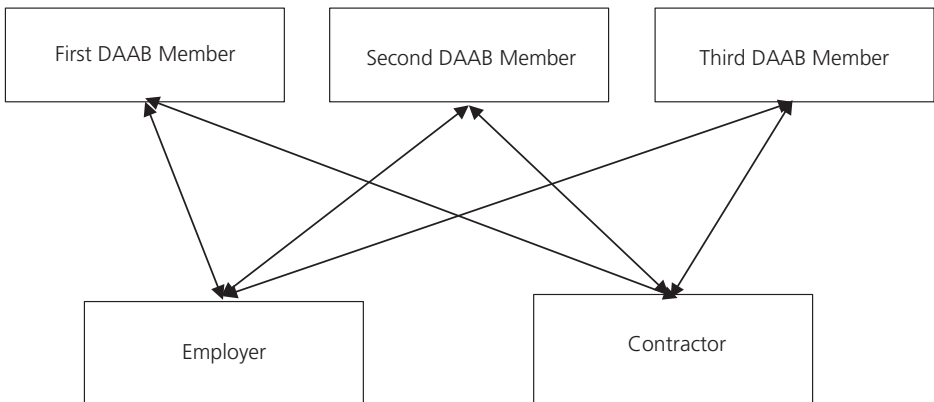
*... the sole Member or three Members (as the case may be) so named in the Contract, or appointed under Sub-Clause 21.1 [Constitution of the DAAB] or Sub-Clause 21.2 [Failure to Appoint DAAB Member(s)].*

7. The multiparty contractual relations are diagrammatically represented in [Figures 1.1 and 1.2](#). Notwithstanding the references to it in the collective tense throughout Clause 21 [*Disputes and Adjudication*], as ‘the DAAB’, unlike a statutory body (be it a judicial authority, tribunal or board), those purely contractual relations neither create nor amount to a distinct collective legal personality. Occasional references to the dispute board owing duties<sup>20</sup> may, in the author’s opinion, be viewed as not holding for collective legal personality.

**Figure 1.1** The basic contractual structure of a sole-Member DAAB



**Figure 1.2** The basic contractual structure of a three-Member DAAB



<sup>20</sup> See, e.g., *Roads Authority v. Kuchling* [2016], [1] and [6].

8. The actions and inactions of a sole-Member or three-Member DAAB (as to which, see DAAB Procedural Rules, Rules 8.2, 8.3 and 8.6) are, however, for most functional purposes deemed to be those of a single entity. Similarly, Clause 6.5 of the DAAB Agreement refers to ‘the DAAB’s warranty of impartiality and independence’ when, as noted in paragraphs 119 and 125 below, and by Ms. Cremona A. M. Cotovelea,<sup>21</sup> there is no collective warranty of any sort.
9. All three of RB2017, YB2017 and SB2017 provide for a ‘standing DAAB’ rather than an ad hoc ‘DAB’. The ‘standing DAAB’ is appointed by the Parties at the start of the Contract, and it ‘stands’ in place for the duration of the Contract.<sup>22</sup>

## GB2021

10. The triumvirate of contractual relations involved in the Adjudicator’s Agreement are akin to that of the sole-Member DAAB as expressed in Appendix: Form of Adjudicator’s Agreement<sup>23</sup> and as depicted in [Figure 1.1](#) above. FIDIC recommends, however, that ‘*if it is felt that a three-member dispute board would be economically viable, then consideration should be given to amending the Contract provisions related to the Adjudicator so as to introduce instead a Dispute Avoidance/Adjudication Board (DAAB).*’<sup>24</sup>
11. It is envisaged that the Adjudicator ‘*is mobilised from the outset of the Contract implementation.*’<sup>25</sup> Once appointed, however, the nature of the Adjudicator’s mobilisation and services can take one of three kinds – namely: (1) ‘Option 1’ – immediate mobilisation yet ‘on standby’,<sup>26</sup> only giving binding decisions on disputes when called on to do so; (2) ‘Option 2’ – immediate mobilisation, providing informal assistance from time-to-time and giving binding decisions on disputes; and (3) ‘Option 3’ – immediate mobilisation, providing regular assistance (including through regular Site visits) and giving binding decisions on disputes.<sup>27</sup> Options 2 and 3 point to the ‘standing mode’, by which, as FIDIC describes:

*[The Adjudicator] becomes and remains knowledgeable about the Contract, informed about the progress of the Works and performs regular Site visits...<sup>28</sup>*

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<sup>21</sup> Chern, 2019, p. 90.

<sup>22</sup> Given its purpose, perhaps it would have been more symbolically appropriate to situate the provisions establishing the DAAB (namely, the second to sixth paragraphs of Sub-Clause 21.1 [*Constitution of the DAAB*]) in the vicinity of the *dramatis personae* clauses – namely, Clause 2 [*The Employer*], Clause 3 [*The Engineer*] and Clause 4 [*The Contractor*].

<sup>23</sup> See GB2021, Guidance Notes, p. 31.

<sup>24</sup> *Ibid.*, p. 29.

<sup>25</sup> *Ibid.*, p. 30.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*, p. 29.

## The alternative ad hoc DAB

12. A form of amendment to RB2017, YB2017 and SB2017 provides for the well-known, and oft criticised,<sup>29</sup> alternative kind of board known as the ‘Dispute Adjudication Board’ (or ‘DAB’).<sup>30</sup> As the Latin adjective ‘ad hoc’ suggests, the DAB is appointed when necessary or needed when a Dispute arises. It disbands when it has given its decision on that Dispute unless, in the meantime, one of the Parties has referred another Dispute to it under the same contract.
13. Where the Site is situated in a country that lacks a well-resourced and independent commercial court system, the dispute board (whether standing or ad hoc) is commended as a mode of claim resolution that is to be preferred over commercial mediation (even where such is genuinely available), arbitration and litigation, and especially by a foreign contractor.<sup>31</sup> More specifically, it has been observed<sup>32</sup> that an ad hoc dispute board:

*may be preferred in the following circumstances:*

- *where the Time for Completion is six months or less;*
- *where the project value is small and the costs of a standing DAAB would be disproportionate;*
- *where a specialist DAAB is likely to be required; or*
- *where most of the work is undertaken off Site (such as the design and manufacture of plants).*

14. The maximum construction period of six months might appear arbitrary in circumstances where the remuneration of the DAAB members is unregulated, the potential technical diversity of a DAAB (whether standing or otherwise) can cater for any need for specialisation, and the physical distance between the Member(s) of the DAAB and the Site is no different as between a standing one and an ad hoc one. At any rate, it is recognised that there will be occasions and circumstances where an ad hoc DAAB will indeed be at least equally suited to the needs of the Parties.
15. Where there is an imbalance between parties as to the practical advantages of a dispute board, it has not been an unusual occurrence for the provisions of the FIDIC First Editions relating to the DAB to be entirely deleted at the behest of the developer.<sup>33</sup> FIDIC has reproved this practice as a modification of RB2017, YB2017 and SB2017 that does not comply with a ‘Golden Principle’ (i.e. one of the ‘contractual principles of each form of FIDIC contract FIDIC considers to be inviolable and sacrosanct’<sup>34</sup> – namely that unless there is a conflict with the governing law of the Contract, all formal Disputes must be referred to a Dispute

<sup>29</sup> Kelsey *et al.*, 2017, pp. 207–216.

<sup>30</sup> See RB2017 Guidance, p. 48; YB2017 Guidance, p. 52; SB2017 Guidance, p. 51.

<sup>31</sup> Chern, 2019, p. 2.

<sup>32</sup> Corbett, 2020, p. 531.

<sup>33</sup> Hök, 2012.

<sup>34</sup> See FIDIC Golden Principles, s. 2, p. 6; see also the definition set out at s. 1, p. 5.

Avoidance/ Adjudication Board (or a Dispute Adjudication Board, if applicable) for a provisionally binding decision as a condition precedent to arbitration.<sup>35</sup>

16. More specifically, FIDIC Red 1999 and FIDIC Pink 2005 both establish a standing DAB. Nevertheless, where provision for a DAB has not been deleted entirely, the ad hoc board has become a common feature of both FIDIC Red 1999 and FIDIC Pink 2005 by way of deliberate amendments. This is regrettable. It may be understating the experience of the construction industries in numerous countries to say that the ad hoc board has not been entirely free of problems as a means of resolving Disputes satisfactorily without the need for arbitration (or litigation). This is so not least because the ad hoc board is often constituted only once the Parties are already mired in an adversarial relationship over one or more matters.
17. Would-be claimants will do well to recognise what type of board will or may be constituted under the Conditions of Contract; and, if they wish to establish the other (or another) kind of board then they do need to ensure that the Conditions of Contract actually provide for the establishment of that type of board. The difficulties that may arise from an unsuitable arrangement for ‘speedy justice’ are legion in practice; one such poor outcome is illustrated in the ICC’s published extract of *ICC Case No. 16570*,<sup>36</sup> which indicates that the Parties had entered into a contract incorporating FIDIC Yellow 1999. The Employer gave notice of termination on account of alleged delays in the performance of the contract. The Contractor objected and took steps to set up an ad hoc DAB, which subsequently gave two decisions. The Employer issued notices of dissatisfaction against both decisions. In a subsequent arbitration, the Contractor requested an order enforcing the DAB’s decisions, while the Employer objected that the Contractor’s claims were time-barred and brought counterclaims. Ruling first on its jurisdiction, the arbitral tribunal found (inter alia) that the DAB’s decisions could not be enforced because the DAB that had been set up was an ad hoc DAB, whereas the Parties’ intention, as reflected in the Conditions, was to have a standing DAB. As the DAB was therefore improperly constituted, its decisions could not be binding.

## Why the DAAB/Adjudicator is constituted

18. Klee<sup>37</sup> encapsulates the DAAB’s raison d’être thus:

*Every construction project is unique and perhaps this is why there is a general absence of ‘corporate memory’ in the construction industry (Chern, 2010). Regrettably, similar types of disputes arise on many construction projects and it is naïve to think we can eradicate disputes by clever contract drafting alone. What parties want is a dispute review device that is considered fair, economic, and causes the least disruption to the due performance of the contract.*

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<sup>35</sup> See FIDIC Golden Principles, s. 5, p. 12.

<sup>36</sup> [2012].

<sup>37</sup> Klee, 2015, pp. 444 and 453.

*Due to the enormous volume of correspondence and occasional friction between participants, it is usual to see minor disputes accompany large construction projects on a daily basis. A certain, intermediate dispute resolution level is, therefore, widely appreciated. It can make people (such as the top management of the interested parties) sit together at a joint table to try to find a compromise approach and thus avoid costly arbitration or litigation proceedings. At these meetings, opinions can get vented, tensions released and personal antagonisms extinguished in the presence of impartial, well-informed experts. Experienced pundits provide the parties with a solution that will likely result in a required compromise. Active on these boards are experts who need not be lawyers (or if lawyers, lawyers with extensive practical backgrounds in the field of construction projects), which is why they are spoken of as being 'user friendly'. The boards can also be made up of suitable combinations of personalities with varied experience and specializations.*

*A dispute board becomes part of the project administration and can thereby influence (during the contract period), the performance of contracting parties. It has 'real-time' value. Many disputes concern non-absolute matters and, in such cases, the dispute board can devise solutions, which avoid 'win-lose' situations while keeping within contractual limitations, working relationships are less affected and site-level partnering can continue (Chern, 2010).*

19. The overriding purpose of a DAAB is to independently, impartially and expertly assist the Parties in the avoidance of Disputes and in the resolution of those that do arise. If there is one key feature that distinguishes the DAAB from a DAB it is that the former engages with the Parties early, offering 'real-time' project value,<sup>38</sup> based on a familiarity with the project and an ability to act more quickly than an ad hoc DAB, and an enhanced role of helping to avoid Disputes or to resolve them at an early stage.<sup>39</sup>
20. In this regard, the RB2017 Guidance,<sup>40</sup> YB2017 Guidance<sup>41</sup> and SB2017 Guidance<sup>42</sup> all state in relation to the constitution of the DAAB:

*It is generally accepted that construction projects depend for their success on the avoidance of Disputes between the Employer and the Contractor and, if Disputes do arise, the timely resolution of such Disputes.*

*Therefore, the Contract should include the provisions under Clause 21 which, while not discouraging the Parties from reaching their own agreement on Disputes as the Works proceed, allow them to bring contentious matters to an independent and impartial dispute avoidance/adjudication board ('DAAB') for resolution.*

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<sup>38</sup> Nadar, 2017, p. 96; Glover and Hughes, 2018, p. 33.

<sup>39</sup> Godwin, 2020, p. 201.

<sup>40</sup> At p. 50.

<sup>41</sup> At p. 50.

<sup>42</sup> At p. 51.

*The provisions of this Sub-Clause are intended to provide for the appointment of the DAAB, and FIDIC strongly recommends that the DAAB be appointed, as a 'standing DAAB' – that is, a DAAB that is appointed at the start of the Contract who visits the Site on a regular basis and remains in place for the duration of the Contract to assist the Parties:*

- (a) *in the avoidance of Disputes, and*
- (b) *in the 'real-time' resolution of Disputes if and when they arise to achieve a successful project.*

21. FIDIC Gold 2008 Guide<sup>43</sup> makes the point concisely, thus:

*Prevention is better than cure, and the DAB is entrusted also with the role of providing informal assistance to the Parties at any time in an attempt to resolve any disagreement.*

22. Prof Nael G Bunni<sup>44</sup> explains how in this setting timing is (of course) everything:

*Thus, by being alert to the process of the manifestation of a dispute, the DAAB would deal with disagreements contemporaneously when conflicting views were expressed by the parties. Such disagreements and conflict are settled as soon as possible after they arise rather than being left to fester and develop into intransigent disputes.*

23. In the FIDIC Golden Principles,<sup>45</sup> a Task Group of the FIDIC Contracts Committee, known as 'TG15', amplifies the points in the following terms:

*FIDIC considers that availability of an independent and impartial DAAB or DAB to (provisionally) resolve disputes is fundamental to a fair and balanced Contract, if permitted by the applicable Laws. A DAAB or DAB can resolve disputes in real time, and thereby enable the Parties to plan their future activities based on the reasoned decision of experienced, independent and impartial persons who are familiar with the execution of projects and administration of construction contracts.*

*Further, a DAAB or standing DAB can materially assist in the avoidance of disputes, by assisting the Parties to informally resolve issues before they become formal disputes.*

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<sup>43</sup> At p. 135; see also Chern, 2019, p. 4.

<sup>44</sup> FIDIC Dispute Avoidance and Adjudication Forum Practice Note: Dispute Avoidance – focusing on dispute boards (Issue no. 1, version 1, 2023), Foreword, p. 6.

<sup>45</sup> Section 5, p. 12; see also Sun, 2019.