

Insights

FIDIC CONTRACTS – UPDATE ON CONFERENCE AND RAINBOW SUITE

Dec 15, 2022

I think all of the attendees of the FIDIC 2022 International Users' Conference in London in November 2022 were delighted to be able to congregate in person, after two successive years of an on-line conference due to general pandemic restrictions. I know I was – not least because it meant I didn't have to contend with any "you're on mute" moments during my presentation on industry feedback and early use of FIDIC Green Book 2021.

It is six years since FIDIC unveiled the pre-release of the 2017 Yellow Book, and in this conference it felt like we've moved away from the training and explanations of how the 2017 suite works as compared to the well-regarded 1999 suite of contracts. Instead, this conference focused on the use of the contracts: how both the 1999 and 2017 suites have withstood the (many) tests that COVID, the war in Ukraine and global inflation have thrown up and the challenges these raise for projects. In addition, this conference launched the 2022 reprint of the 2017 Red, Yellow and Silver Books, which have all been updated and now include some (not insignificant) amendments to the original 2017 versions. Another launch at this conference was the enormous FIDIC Contracts Guide 2022.

2022 reprint of Red, Yellow and Silver Books 2017

Slightly later than the Q1 2022 anticipated release, FIDIC has now released the revised versions of the original 2017 editions. Certain errata and formatting issues were addressed by FIDIC in 2018 and 2019 with the release of a clarification memorandum. However the 2022 reprint incorporates these flagged minor amendments, as well as more significant changes to the terms and conditions, though FIDIC reported that these do not change the risk profile. The reprinted contracts include a combined list all of the changes as a separate section at the end of each Book for ease of reference.

On the whole these amendments are provided to add further clarity. The 2017 suite prides itself on setting out the consequences for every step in project managing the contract (or failing to comply with it). The difficulty in doing this is that as the contract is increasingly used, new examples of "what happens when?" arise. This has led to some changes in the definitions of "Claim" and of a "Dispute" with more deeming provisions and a number of other consequential changes throughout the Books.

A welcome amendment is that we now know that “Exceptional Events” (the FIDIC defined term replacing Force Majeure from the 1999 suites) must in fact be exceptional. The “exceptional” description having been removed from the definition in the original 2017 editions (we assume because the event itself was re-named “Exceptional”), has now been re-included in the 2022 reprint, re-aligning it with the 1999 editions.

Spot the Difference:

- 1999: “‘Force Majeure’ means an exceptional event or circumstance...”
- 2017 Edition (as originally published): “‘Exceptional Event’ means an event or circumstance which...”
- 2017 Edition (2022 reprint): “‘Exceptional Event’ means an exceptional event or circumstance which...”

While it might seem obvious, from a legal point of view the removal of the “exceptional” requirement in the description of the event certainly appeared to have changed the requirements of the “Exceptional Event” test. All the more important when the definition of force majeure (here Exceptional Events) has been under so much scrutiny in the past three years. This may seem overly picky of the lawyers to have questioned this change to the definition but we are a fastidious bunch if nothing else. The best explanation I can give is of my friend called Big Tom, who is not in fact large at all – the titles of sub-clauses should not replace the description of the thing itself.

Other changes are to the DAAB’s appointment. Further clarification provided in the event of disagreement and also some changes to the restrictions on impartiality of DAAB members (relaxing of the rules in the case of agreement between the parties and disclosure of past relationships).

All in all these changes look sensible. However, care should be taken to ensure that contracts entered into reference the correct edition. FIDIC states that amendments “will be effective from 1 January 2023”, although this is questionable if the parties specify they are using the “original” edition as opposed to the 2022 reprint (at least under English law). Users will need to update their libraries with the new versions (which unfortunately looks the easiest way of digesting it all) or download the consolidated amendment sheets for free from the FIDIC Bookshop at fidic.org.

FIDIC 2017 Contracts Guide 2022

The 2022 Contracts Guide is another enormous tome from FIDIC at twice the length of the guide to the 1999 suite. Unsurprising as this guide is meant to be an all-encompassing sub-sub-clause by sub-sub-clause reference book for the already weighty 2017 Red, Yellow and Silver books (2022 reprints). A number of descriptions and explanations are repeated throughout, meaning users can dip into whichever sub-clause they need guidance on and be sure that all relevant guidance will

appear in that section. Even I don't fancy reading the whole thing cover to cover, so that's got to be good.

A brief preview showed that there look to be some helpful reference tables showing the positions in the Red, Yellow and Silver Books on certain themes alongside each other, even though the sub-clause numbers may differ slightly between the books. Currently it's only available in electronic form, though that's probably for the best as I had limited baggage allowance on the flight home. The hard copies will be available in the New Year.

Global Challenges

It must be said that world events in recent years are causing contract drafters and operators to examine clauses of contracts that haven't previously been the focus of so much attention – clearly force majeure and Exceptional Events with the pandemic – and now the impact of war and supply chain issues has brought those same clauses back into the spotlight again. In addition, indexation provisions and formulae calculating fluctuations to cater for an inflationary market.

The FIDIC books are international contracts, and applicability and other terms implied into contracts will vary the contractual consequences in different jurisdictions. What is interesting is how the FIDIC sub-clauses respond to these situations, even where their application may vary across jurisdictions.

There is no common law doctrine of force majeure in English law, we only have the very narrow doctrine of frustration. For force majeure to apply under English law, we are entirely dependent on the contractual terms – so what it says in the contract regarding Exceptional Events governs the position between the parties.

Similarly, if there are no express fluctuation provisions in the contract then the contract price will not change and the risk remains with the contractor (unless another contractual provision permits additional cost). Civil law countries may cater for both force majeure and “imprévision” or hardship (due to unforeseen circumstances) in their civil codes. In such jurisdictions if the contract doesn't include any or adequate provisions, then parties may find they are implied by law. This isn't the case under English law, and so the contractual provisions are the focus of greater scrutiny.

FIDIC's 2017 standard form contracts do not include mandatory indexation provisions, but optional provisions exist in the contract if the parties wish to include for fluctuation in price. This is a point for commercial negotiation but care should be taken – if a specific element is not included in the formula, then it is deemed included in the contract sum and no price escalation would be permitted for that element, certainly under English law.

A common theme across all of the projects discussed at the conference is the increased use and support for dispute adjudication (and avoidance) boards – either a DAB or DAAB. Without exception there seemed to be an increased appetite among contract users for a standing dispute

board, as opposed to an ad hoc board. Perhaps it's simply a reflection of the parties seeking guidance in uncertain times.

New Releases

FIDIC's most recent contract release, the short form Green Book, second edition 2021, received praise at the conference, with many commentators (including me) expecting to see it more widely used than its predecessor.

Otherwise, there was very little discussion of what's to come in 2023. As I said last year there are a number of new FIDIC contracts in the pipeline including subcontracts for use with the 2017 suite. In addition FIDIC's various working groups are looking at collaborative contracting, off-shore special conditions, net-zero and technology. I'm certain there'll be plenty to talk about next year, though hopefully only in relation to the new contracts. I think we've had enough disruptive global events.

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