

18 FEBRUARY 2020
PORT-OF-SPAIN, TRINIDAD AND TOBAGO
SEMINAR: DISPUTE AVOIDANCE
AND RESOLUTION IN THE
CONSTRUCTION INDUSTRY
UNDER THE FIDIC RAINBOW
SUITE OF CONTRACTS

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THE RAINBOW SUITE 1999 FIRST EDITION

The “**Red Book**”: Conditions of Contract for Construction for building and engineering works designed by the Employer.

The “**Yellow Book**”: Conditions of Contract for Plant and Design Build.

The “**Silver Book**”: Conditions of Contract for EPC Turnkey Projects.

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Key clauses:

- Clause 2: The Employer
- Clause 3: The Engineer
- Clause 4: The Contractor
- Clause 8: Commencement, delays and suspension;
Clause 11: Defects Liability
- Clauses 13 and 14: Variations and Payment
- Clauses 15 and 16: Termination
- Clause 17: Risk and Responsibility
- Clause 20: [Contractor's] Claims, Disputes [DAB] and ICC Arbitration

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The Particular Conditions:

- Bespoke amendments to the General Conditions drafted by the Parties;

The Appendix to Tender

- Additional contract specific data:
 - Identity of the project
 - Engineer
 - Governing law, ruling language
 - Details of performance security...

The Employer's Requirements [Yellow/Silver] Specification/BOQ/Drawings [Red Book]

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Appendix: General Conditions of Dispute Adjudication Agreement

- Warranty of independence; DAB member obligations; the parties' obligations...

Annex: Procedural Rules for the DAB

- 3 (a) act fairly and impartially as between the Employer and the Contractor..., and
- 3 (b) adopt procedures suitable to the dispute, avoiding unnecessary delay or expense.
- 5 Powers of the DAB; 6 Hearings

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Guidance for the Preparation of Particular Conditions

NB:

“There are no Sub-Clauses in the General Conditions which require data to be included in the Particular Conditions. As noted in sub-paragraph (ii) of the Foreword, the General Conditions refer to any necessary data being contained in the Appendix to Tender or (for technical matters) in the Employer's Requirements.”

[...Clause by clause commentary on possible provisions for amendments.]

THE OBJECTIVE FOR EVERY PROJECT



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Managing claims and disputes:

- Clause 2.5 Employer's Claims
- Clause 3.5 Engineer's Determination
- Clause 20: [Contractor's] Claims, Disputes [DAB] and ICC Arbitration
- Appendix: General Conditions of Dispute Adjudication Agreement
- Annex: Procedural Rules for the DAB

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- **Clause 2.5 Employer's claims**

“...The notice shall be given as soon as practicable after the Employer became aware of the event or circumstances giving rise to the claim. A notice relating to any extension of the Defects Notification Period shall be given before the expiry of such period.

The particulars shall specify the Clause or other basis of the claim, and shall include substantiation of the amount and/or extension to which the Employer considers himself to be entitled...”

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- **Clause 2.5 Employer's claims**

Notice requirement: *"...soon as practicable after the Employer became aware of the event or circumstances giving rise to the claim."*

- What does this mean? What does this extend to:
"if the employer considers himself entitled to any payment under any clause of these Conditions or otherwise in connection with the contract..."

See **NHIC V NIPDEC [2015] UKPC 37**

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- **Clause 3.5 Engineer's Determination**
- Duty of the Engineer to agree or determine any matter referred under the general conditions [issues about time, money or scope]
- If no agreement, a “fair” determination
- Both parties obliged to give effect to a decision unless revised under clause 20

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- **Clause 20.1: Contractor's Claims**
 - For time or money: Requirement to give notice...
 - Describing the event or circumstance...
 - Notice as soon as practicable [???] and not later than 28 days after the Contractor became aware of should have become aware of the event or circumstance...
 - Sub-Para 2: Failure to give notice = no claim
 - Must also keep contemporary records
 - Fully detailed claim within 42 days or as agreed with the Engineer, may be treated as interim; updated monthly. Final claim within 28 days after impacts cease

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- **Clause 20.1: Contractor's Claims**
 - Engineer has 42 days [or as agreed] to respond to claim
 - Each payment Certificate to include substantiated amounts for claims until whole claim dealt with
 - The Engineer must proceed under clause 3.5 to determine the length of any EoT or additional payment
 - Unless claim excluded under para 2 of clause 20 [notice requirement]; if C fails to comply with other provisions relating to claim[s], and EoT/payment shall be tic to the extent that failure has prevented/prejudiced proper investigation of the claim

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- Clause 20.2: Appointment of DAB Board: Red [Standing: see Appendix to Tender], Yellow and Silver [Ad hoc: the date 28 days after a Party gives notice to the other Party of its intention to refer a dispute to a DAB in accordance with Sub-Clause 20.4]
- Clause 20.3: Failure to agreement on DAB appointment: Appendix to Tender should supply a default appointing entity.
- Clause 20.4 Obtaining the DAB Decision; Notice of Dissatisfaction [28 days]; Potential for Finality

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- **Clause 20.5 Amicable Settlement:**

*“Where notice of dissatisfaction has been given under Sub-Clause 20.4 above, both Parties shall attempt to settle the dispute amicably before the commencement of arbitration. However, unless both Parties agree otherwise, arbitration may be commenced on or after the **fifty-sixth** day after the day on which notice of dissatisfaction was given, even if no attempt at amicable settlement has been made.”*

- The 8 week “pause and think” provision.

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- Clause 20.6 Arbitration
- Unless settled amicably, any dispute where DAB Decision is not final and binding may be settled by international arbitration
 - ICC Rules of Arbitration
 - 3 arbitrators; Language as defined in COC 1.4
 - Engineer may be a witness; DAB decision admissible in evidence
 - May be commenced at any time; Parties', Eng.'s and DAB's obligations do not alter if arbitration ongoing during the course of the works

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- **Clause 20.7 Failure to comply with DAB Decision:**
- Where no notice of dissatisfaction [NOD] is given, so the DAB Decision is final and binding, AND a party fails to comply with it:
- The other party can proceed straight to arbitration under clause 20.6...
- **BUT MUST THEY PAY FIRST...?**
- **2013 FIDIC Memorandum: Yes, pay, then argue.**

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- **Clause 20.8 Failure to comply with DAB Decision**
- **Expiry of the DAB Appointment [default provisions for absence of a DAB for any reason – provision to proceed straight to arbitration]**
- **DAB decision is not a precondition to arbitration.**

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- Clause 20.2: DAB Agreement incorporates by reference:
- Appendix to General Conditions: General Conditions of Dispute Adjudication Agreement

The DAB must

“paragraph 4(k) “be available to give advice and opinions on any matter relevant to the contract ... when requested by the parties...”

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- Clause 20.2: DAB Agreement incorporates by reference:
- Annex: Procedural Rules for the DAB
- See paragraph 2:
“...The purpose of site visits is to enable the DAB to become and remain acquainted with the progress of the Works, and of any potential problems or claims.”

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Dispute Adjudication: recap of the DAB process under the 1999 forms:

- Ad hoc or standing

Dispute avoidance?

- Clause 20.2: DAB reference for opinion only
- Appendix: General Conditions of Dispute Adjudication Agreement, 4(k)
- Annex: Procedural Rules for the DAB, paragraph 2

Dispute Resolution

- Final and Binding Arbitration [ICC]

WHAT CHANGED IN 2017?



2017 Red, Yellow & Silver Books

- Claims and dispute management provisions
- Clause 3.7 Agreement or Determination by the Engineer
- Clause 20: Employer's & Contractor's Claims
- Clause 21: Disputes and Arbitration
- Appendix: General Conditions of Dispute Avoidance / Adjudication Agreement
- Annex: DAAB Procedural Rules

2017 Red, Yellow & Silver Books

- There is no equivalent clause 2.5, but see 20.2 [limits Employer claims, set-offs, deductions]
- The “Appendix to Tender” is now “Contract Data”
- Contract Data constitutes “Particular Conditions Part A”
- Particular Conditions are now “Particular Conditions Part B”, and are called “Special Provisions”
- FIDIC urges drafters of Special Conditions to follow the Five Golden Principles

2017 FORMS [ALL]: GOLDEN PRINCIPLES (GPs): FIDIC strongly recommends...

GPs ...are necessary to ensure that modifications to the General Conditions...

- Are limited to those necessary for the particular features of the Site and Project and to comply with applicable law;
- Do not change the essential fair and balanced character of a FIDIC contract; and
- It remains recognizable as a FIDIC contract.

2017: GOLDEN PRINCIPLES (GPs): FIDIC strongly recommends...

–GP5: All formal disputes must be referred to a DAAB...

for a provisionally binding decision... NB: as a condition precedent to arbitration.

2017 Red, Yellow & Silver Books

- Clause 3.7 Agreement or Determination by the Engineer [the new clause 3.5]
- When acting under [3.7] the Engineer “shall not be deemed to act for the Employer”
- 3.7.1 Consultation to reach agreement
- 3.7.2 “Fair” Determination
- 3.7.3 Time limit for Engineer’s Notice agreement or determination is 42 days or as agreed
 - If No Notice from the Engineer: deemed rejection, deemed dispute, dispute may be referred to DAB

2017 Red, Yellow & Silver Books

- Clause 3.7: ...
- 3.7.4 Effect of Agreement or Determination: it is final unless/until corrected under clause 3.7.4 or revised under clause 21
- Determinations are given effect in payment process
- 3.7.5 If Engineer's Decision is not accepted, Notice of Dissatisfaction [NOD] MUST BE GIVEN
- NOD within 28 days of Determination or Determination is final
- Failure to comply with Agreement or Final Determination, immediate arbitration to enforce

2017 Red, Yellow & Silver Books

- Clause 20: Employer's & Contractor's Claims
- Employer's subject to same claims provisions as the Contractor [20.1] for time or money
- "Other Claims" [20.1(c)] referred to Engineer under clause 3.7, otherwise claims regime in 20.2 applies
- 20.2.1 Notice of Claim, 28 days, or time barred
- 20.2.2 Engineer determines if time barred, if no Notice, deemed valid – other party may dispute
- Claiming party may dispute notice that claim is time barred or provide reasons for late submission with claim to justify late submission

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- Clause 20: Employer's & Contractor's Claims
- 20.2.3 Obligation to keep contemporary records... as necessary to substantiate any claim
- 20.2.4 Fully detailed claim [contents prescribed], submitted within 84 days [concurrent with initial notice period]
- Claim must include statement of contractual or other basis of Claim or deemed to lapse and Engineer must issue a Notice that it has lapsed.
- No Notice, the substantiated claim deemed valid, other party may object.

2017 Red, Yellow & Silver Books

- Clause 20: Employer's & Contractor's Claims
- If Engineer issues Notice and claiming party disagrees or considers there are circumstances justifying the delay, he should include those reasons with the fully detailed claim
- 20.2.5 After receipt of a fully detailed claim, the Engineer agrees or determines it under clause 3.7
- Clause 3.7 determination includes whether the Notice of Claim or Detailed Claim shall be treated as valid
- Provisions for continuing claims and payments on account

2017 Red, Yellow & Silver Books

- Clause 21: Disputes

Disputes Avoidance and Adjudication Board [DAAB]

- 21.1 Parties obliged to appoint members of the DAAB as stated in the Contract Data or 28 days after receipt of the Letter of Acceptance
- DAAB constituted on signature of the DAAB Agreement
- Provisions for appointing or replacing DAAB members
- Provisions for expiry of the term of the DAAB

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- Clause 21: Disputes
- 21.2 Default provisions upon failure to appoint DAAB member[s], including replacements by appointing entity or official
- Default provisions for deemed signature and acceptance of DAAB Agreement
- Requirement for the parties to pay half of any fees to appointing entity or official

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- Clause 21: Disputes
- Clause 21.3 Avoidance of Disputes
- Specific role for DAAB to assist parties, if agreed and requested, to avoid disputes. DAAB may also invite parties to make a request. At any time, except when the Engineer is making a clause 3.7 agreement or determination.
- Provisions for joint meetings and discussions.

2017 Red, Yellow & Silver Books

- Clause 21: Disputes
- Clause 21.4 Obtaining DAA's Decision
- 21.4.1 Time for referring a dispute is 42 days from service of NOD under 3.7.5
- Subject to local law, DAAB reference interrupts limitation period
- 21.4.3 DAAB Decision within 84 days or as agreed – Decision can be withheld if payment of DAAB fees outstanding

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- Clause 21: Disputes
- A Decision binds parties; it must be complied with
- 21.4.4 If either party is dissatisfied with all or part of the DAAB Decision, it must serve a NOD within 28 days of receipt of the Decision/part of Decision
- If the DAAB fails to issue its Decision in time, either party may serve a NOD
- Neither party may proceed to arbitration unless a NOD of the Decision has been served
- If no NOD given, the Decision becomes final and binding

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- Clause 21: Disputes
- Appendix: General Conditions of Dispute Avoidance / Adjudication Agreement
- Terms to govern duties of Members and Parties in DAAB process, also deal with DAAB fees and expenses, and provisions to govern the resignation of members or termination of the DAAB's remit.
- Disputes under the DAAB Agreement are governed by arbitration.

2017 Red, Yellow & Silver Books

- Clause 21: Disputes
- Annex: DAAB Procedural Rules
- Provisions for site visits and meetings, communications and documentation, hearings and Decisions
- The DAAB powers and procedural directions are spelled out in much more detail.
- New procedure has detailed provisions for objection and challenge to DAAB Members.

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- Clause 21: Disputes
- Clause 21.5: Parties may commence arbitration 28 days after NOD given.
- 28 day cooling off period to enable parties to attempt to settle the dispute amicably.
- Presents an opportunity for ADR, direct negotiation, mediation, expert determination, early neutral evaluation...
- Clause 21.8 WHERE NO DAAB, PARTIES CAN PROCEED STRAIGHT TO ARBITRATION

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- Clause 21.6: Arbitration

“Any dispute... of which the DAAB Decision (if any) has not become final and binding shall be finally settled by international arbitration.”

- Default provision is ICC Arbitration by one or three arbitrators, in the ruling language of the Contract
- The Engineer may be called as a witness; the DAAB Decision is admissible in evidence
- Arbitration can be commenced at any time and the award is due and payable on issue

2017: EFFECTIVE USE OF ADR: DISPUTE AVOIDANCE

Contract processes in the 2017 forms demanding continuous party engagement:

- “Neutral” Engineer: 3.7
- Express contract term for scoping out and avoidance of potential disputes:
 - 3.7.1 [Consultation... Agreement], 3.8 [Meetings], 8.4 [Advance Warning], 21.3 [Dispute Avoidance]
- Dispute Avoidance and Adjudication Boards: 21.3, 21.4
- 21.5 Amicable settlement: mediation, expert determination, other ADR

THE AMBITION



THANK YOU FOR LISTENING

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