



FIDIC Red Book 2017 A MENA perspective

On 5 December 2017, over 17 years after the 1st edition, the International Federation of Consulting Engineers (**FIDIC**) published the second editions of its Rainbow Suite of contracts. In a contractual landscape that has traditionally been dominated by the older FIDIC 87 Red Book, the new “Red Book” will be of particular interest to those operating in the Gulf region.

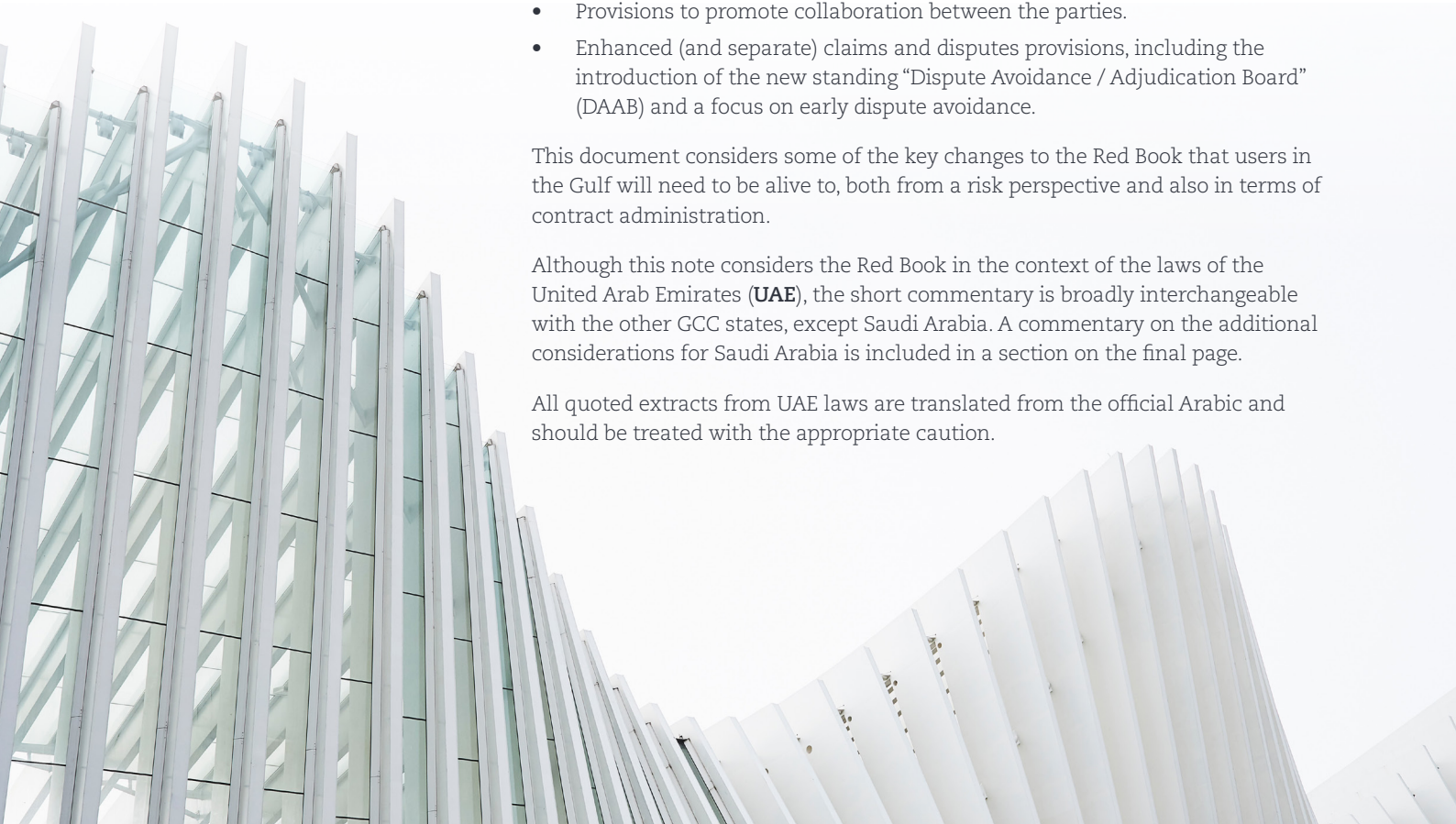
Headlines:

- A philosophy that is broadly similar to the pre-release version of the Yellow Book 2017.
- 1st Edition risk profile is generally maintained.
- Generally less flexible, more complex and less user friendly.
- 50% longer than the 1st Edition.
- Expanded role and powers for the Engineer.
- Exceptionally prescriptive drafting, such as new definitions and “step-by-step” procedures, resulting in a greater administrative burden on the Contractor and, in principle, additional costs for the Employer.
- New time limits which if not met, trigger deeming provisions.
- Symmetry between the Contractor’s and the Employer’s rights and obligations.
- Provisions to promote collaboration between the parties.
- Enhanced (and separate) claims and disputes provisions, including the introduction of the new standing “Dispute Avoidance / Adjudication Board” (DAAB) and a focus on early dispute avoidance.

This document considers some of the key changes to the Red Book that users in the Gulf will need to be alive to, both from a risk perspective and also in terms of contract administration.

Although this note considers the Red Book in the context of the laws of the United Arab Emirates (**UAE**), the short commentary is broadly interchangeable with the other GCC states, except Saudi Arabia. A commentary on the additional considerations for Saudi Arabia is included in a section on the final page.

All quoted extracts from UAE laws are translated from the official Arabic and should be treated with the appropriate caution.



Contractor

General Obligations (Cl. 4.1) The Red Book simplifies the Contractor's core obligation: the Contractor shall execute the Works in accordance with the Contract. There is no reference to or acknowledgement of principles of good faith, mutual intentions or other elements of applicable laws in the Gulf.

If the Contract specifies that the Contractor shall undertake any design, the resulting obligations have been expanded and now include an undertaking that the design and the Contractor's Documents comply with the technical standards stated in the Specification and the Laws (in force when the Works are taken over) and otherwise are in accordance with the documents forming the Contract.

Contractor's Documents (Cl. 4.4) Construction cannot commence until the Engineer has (or is deemed to have) issued a Notice of No-objection in relation to the Contractor's Documents. The Contractor's obligations to provide As-Built Records and Operation and Maintenance Manuals have been expanded and are now set out separately in cl. 4.4.2 and 4.4.3.

Quality Assurance (Cl. 4.9) The Contractor is required to prepare and implement:

- a quality management system (QMS), and
- a compliance verification system (CVS).

The Contractor shall conduct internal audits of the QMS, with reports to the Engineer and submit a complete set of CVS records in a manner acceptable to the Engineer.

Programming (Cl. 8.3) The programming requirements have been expanded to include additional details that must be included in each programme, including logic links, float and critical path; contractors will need to consider the increased costs of complying with such requirements at tender stage.

Furthermore, nothing in any programme will relieve the Contractor from any obligation to give a contractual notice under the new Conditions, reducing the scope for reliance on programmes as notice of claims for delay.

Extension of Time (Cl. 8.5) The Contractor is not required to provide a separate notice of a claim for an extension of time for a delay caused by a Variation. The mechanism for dealing with the time consequences of a Variation has, instead, been rolled into the Variation procedure.

In a major departure from the 1st edition, the Contractor has an express entitlement to an extension of time for an increase of more than 10% in the estimated quantities, if this causes delay.

The Parties are prompted to adopt rules and procedures dealing with concurrent delay by means of the Special Provisions (formerly referred to as Particular Conditions). Parties in the UAE are free to provide by agreement for the manner in which concurrent delay will be dealt with. In the absence of a prevention principle, a "but for" test or "dominant cause" theory under UAE law, apportionment is often considered to be the appropriate solution.

Taking Over (Cl. 10.1) The Works will not be considered complete for the purpose of taking-over unless the Engineer has (or is deemed to have) issued a Notice of No-objection to the As-Built Records and Operation and Maintenance Manuals under cl. 4.4 and the training under cl. 4.5 has been completed in accordance with the Specification.

Costs of Remedying Defects (Cl. 11.2) The Contractor is responsible for remedying defects that arise from improper operation and maintenance which was attributable to matters for which the Contractor is responsible (i.e. As-Built Records, Operation and Maintenance Manuals and Training).

Variations (Cl. 13.3) A clearer distinction is made between the two methods for initiating a Variation:

- Variation by Instruction, and
- Variation by Request for Proposal.

The former is by far the most common in the Gulf and now requires the Contractor to submit detailed particulars comprising the work, resources and methods to be adopted; a programme for execution of the Variation; a proposal for modifying the Programme and Time for Completion; a proposal for modifying the Contract Price, with supporting particulars; and the amount of any time related costs. It is likely that a large commercial team will be required in order for the Contractor to comply with these requirements.

Design Risk (Cl. 17.4) A new indemnity has been inserted requiring the Contractor to indemnify the Employer against all errors in the Contractor's design (if applicable) which result in the Works not being fit for purpose. Importantly, the exclusion of indirect or consequential loss and the aggregate cap on liability under cl. 1.15 applies to this indemnity, limiting the Contractor's liability in this regard.

Liability Caps (Cl. 1.15) Delay damages and indemnity liabilities relating to intellectual property rights have been carved out from the exclusion of indirect or consequential loss. Concepts of "indirect" and "consequential" loss remain undefined. "Gross negligence" has also been carved out from the aggregate cap. Although this concept has no specific meaning in UAE law, it is consistent with laws which prohibit any exclusion or limitation of liability for fraud or gross mistake, or delict (acts causing harm, analogous to a tort).

Similarly, liability arising from a mandatory provision of law is not capable of being excluded by contract. Importantly, a Contractor and Engineer are subject to decennial liability obligations as a matter of law notwithstanding this clause.

Employer

Financial Arrangements (Cl. 2.4) The Employer's financial arrangements shall be detailed in the Contract Data. As the corresponding provision in the first edition, which required a request from the Contractor to trigger disclosure, is typically deleted, the new default provision is unlikely to usher in a new era of transparency in the Gulf.

Liability for Care of the Works (Cl. 17.2, 17.5 & 17.6) The categories of what used to be referred to as 'Employer's Risks' have been expanded and now also include any act or default of the Employer's Personnel or other contractors. Clause 17.2 addresses concurrency for the second time, and consistent with the less prescriptive approach of UAE law, permits apportionment of loss or damage resulting from a combination of an Employer-risk event and a cause of damage for which the Contractor is liable.

Indemnities (Cl. 17.5) The Employer's indemnities in favour of the Contractor have now been expanded to include loss of or damage to property attributable to any negligence, wilful act or breach of contract by the Employer, the Employer's Personnel, or any of their respective agents. The Employer is also now required to indemnify the Contractor in respect of all claims, damages, losses and expenses in respect of damage to or loss of property to the extent such damage arises from an event for which the Employer is liable under cl. 17.2. Both parties' liability under the indemnity provisions will be reduced proportionately to the extent an event for which the other party is responsible has contributed to the loss.

EOTs (Cl. 4.15 & 8.5) The Contractor's entitlement to extensions of time has been expanded to grant relief where the non-suitability or non-availability of an access route arises as a result of changes to that access route by a third party after the Base Date. The extension of time entitlement as a result of delays caused by public authorities has been extended to include delays caused by private utility entities such as DEWA or Empower.

Latent Defects (Cl. 11.10) The 1999 Red Book was silent on latent defect liability (save to say that each Party shall remain liable for unperformed obligations following issue of the Performance Certificate) and so the Contractor's liability would be subject to the governing law approach. Under the 2017 Red Book, the Contractor's liability for latent defects in Plant shall cease two years after expiry of the Defects Notification Period except if prohibited by law (or in any



case of fraud, gross negligence, deliberate default or reckless misconduct). This provision is subject to the application of the mandatory prohibition on adjusting statutory prescription periods under UAE law.

Profit (Cl. 1.1.20, 13.3 & 15.6) Whilst the 1999 Red Book entitles the Contractor to recover Cost Plus Profit for various relief events, the amount of profit recoverable under the 2017 Red Book is now set at a default sum of 5% in most circumstances. The Contractor is also now expressly entitled to recover lost profit where Works are omitted or where the Contract is terminated for convenience, although the margin of profit is not stipulated. This is likely to comprise loss of profit that the Contractor would have earned on performing or completing the works, a type of loss that is capable of being and is in practice awarded by courts under UAE law.

Exceptional Event (Cl. 18) Force majeure is renamed as the more neutral “Exceptional Event”, though the risk allocation remains the same. In common with other civil law jurisdictions force majeure is a recognised concept in the UAE and, therefore, renaming force majeure is more likely to cause confusion than add clarity.

Engineer

Engineer (Cl. 3) The Engineer’s role is expanded and enhanced. This is consistent with the high esteem in which the engineering profession is held by the region’s owners and developers.

Qualifications (Cl. 3.1) A new requirement for the Engineer to be a professional engineer prevents other construction professionals ousting FIDIC’s members from this key project role.

Engineer’s Duties and Authorities (Cl. 3.2) The Employer is prohibited from imposing an obligation on the Engineer to obtain consent before issuing a determination in respect of a matter or claim. This is contrary to common practice in the Gulf and is likely to be amended.

Engineer’s Determination (Cl. 3.7) The Engineer must act “neutrally” and, in a departure from the previous edition (and the position at law), the Engineer is not deemed to act for the Employer when making a determination of a matter or claim.

In a positive move towards a collaborative approach in resolving claims in real time, the 2017 Red Book introduces a procedure for consultation to reach agreement, with the Engineer at its heart. Unfortunately, this is offset by a complex process that creates a procedural minefield for all parties.

Thus, if the Parties cannot agree a matter or Claim within 42 days and the Engineer fails to issue a ‘fair determination’ within a further 42 days, then either the Engineer is deemed to have rejected the Claim; or

in the case of any other matter, it is deemed to be a Dispute which either Party can refer to the DAAB without the need for a Notice of Dissatisfaction (**NOD**). If either Party objects to a determination, it must issue a NOD within 28 days, otherwise the determination shall be deemed final and binding. If either Party fails to comply with an agreement of the Parties or a final and binding determination, the other Party may refer the failure directly to arbitration for enforcement by expedited procedure.

Meetings (Cl. 3.8) In what appears to be a further nod in the direction of collaborative working, the Engineer or the Contractor can summon each other (but not the Employer, who may attend voluntarily) to a management meeting.

Notices and claims

The notice provisions have been significantly re-worked in the 2017 Red Book, resulting in a more prescriptive and more complex set of obligations on the Contractor and, to a lesser extent, on the Employer.

In what might be considered a backward step, notice requirements now appear in approximately 80 places in the 2017 Red Book. ‘Notice’, ‘Claim’ and ‘Dispute’ are now all defined, creating a high probability of lengthy disputes about the effect and application of these provisions.

Notices (Cl. 1.3) A Notice must be in writing and identified as a Notice (but does not need to refer to the clause under which it is issued). Contractors will need to ensure they have adequate resources to comply with these requirements. A “Notice of No-objection” replaces approvals and consents, which will resonate with those seeking to limit their accountability under the contract.

Advance Warning (Cl. 8.4) Advance warning provisions have been introduced requiring each Party to advise the other of any known or probable future events which may adversely affect the performance of the Works, increase the Contract Price or delay the execution of the Works. There is no time limit or explicit sanction for failure to issue an advance warning. Contractors should expect Employers to address this with amendments reducing the Contractor’s entitlement to relief where they fail to issue an advance warning.

The provision is coupled with the Engineer’s entitlement to require the Contractor to submit estimates of the anticipated effects of future events or proposals for mitigating their effect. This may resemble the introduction of an overarching duty to mitigate loss or delay which is conceivably otherwise derived from, and consistent with, the duty of good faith under the UAE Civil Code, Article 246(1). However, the preparation of additional estimates or proposals could be time consuming and costly, and potentially could be built into increased tender prices.

Cessation of Employer's liability (Cl. 14.14) Contractors must take care to include all claims in the Statement on Completion (except for those arising after the issue of the Taking-Over Certificate), Final Statement or any Partially Agreed Final Statement, whether such claims have been referred to the DAAB or have had a NOD issued in relation to them, otherwise the Employer will avoid any liability for them. In addition, the Contractor only has 56 days to dispute the Final Payment Certificate (FPC) under cl. 20.2 otherwise the Contractor will be deemed to have accepted the amounts and the Employer shall have no further liability. Contractors will need to take extra care to ensure all claims are captured in their statements and that the 56 day time bar for disputing the FPC is not missed.

Termination (Cl. 1.16, 15.2 & 16.2) Additional termination rights have been added for both Parties, the most important being that either has a right to terminate if the other fails to comply with a binding agreement or final and binding determination of the Engineer or a decision of the DAAB and such failure constitutes a material breach. Clause 1.16 attempts to deal with a particular difficulty which arises from provisions of the UAE Civil Code which could be read to require that termination of a construction contract requires mutual consent or a court order. It provides that unless such provisions are mandatory, the contractual termination mechanisms will prevail.

Claims (Cl. 20) The Claims provisions have been redrafted and separated from the Dispute provisions.

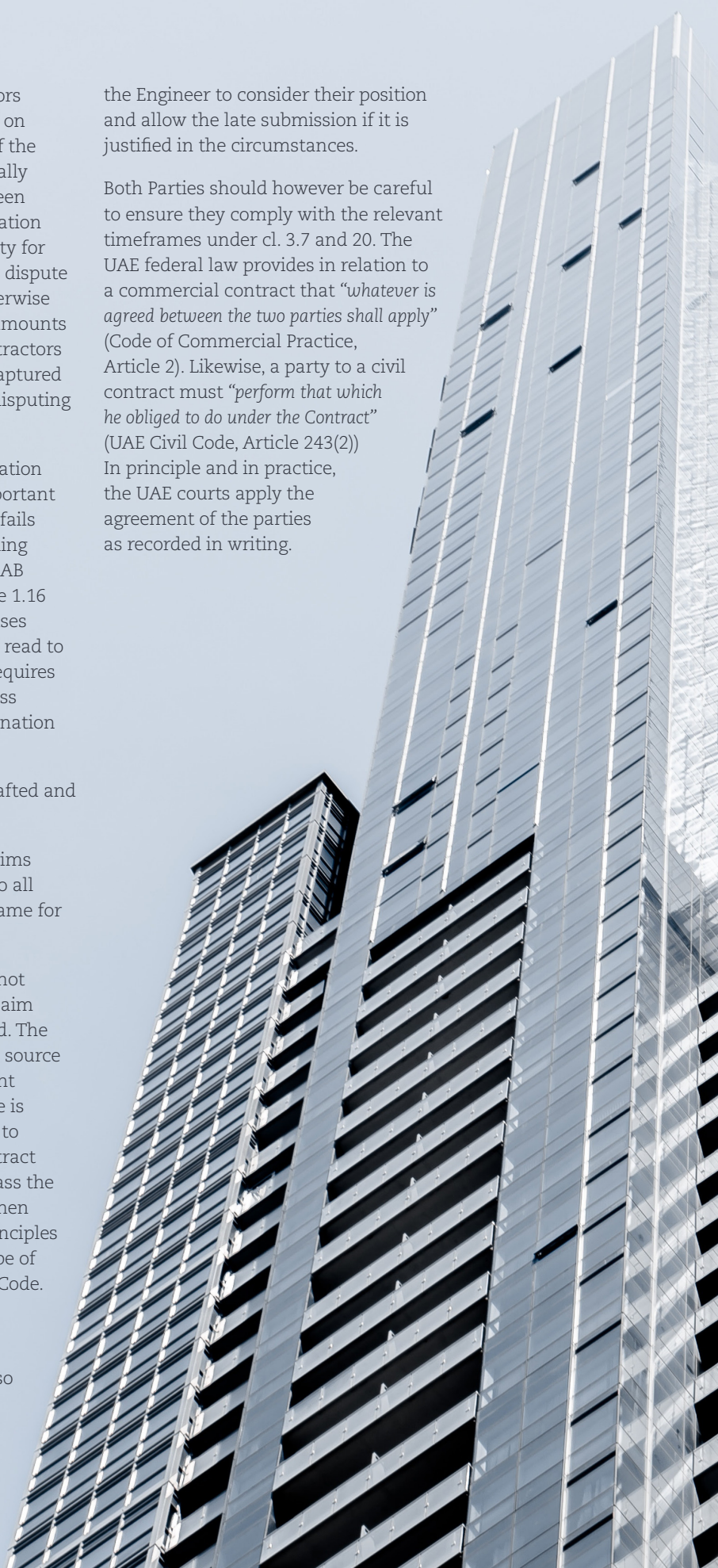
The 1999 FIDIC 28-day time-bar on notification of Claims that always applied to Contractors now also applies to all Employer claims. FIDIC has also increased the timeframe for provision of the Fully Detailed Claim to 84 days.

If a Party's Notice of Claim or Fully Detailed Claim is not submitted within the set timeframes, the Notice of Claim will be invalidated and the claiming Party time-barred. The effect of time bar provisions on entitlement is often a source of controversy on projects in the UAE. The requirement operates as a condition precedent: a compliant Notice is required for an entitlement pursuant to the Contract to arise. If the entitlement is damages for breach of contract or an entitlement at law, such claims potentially bypass the condition precedent. The time bar provisions would then potentially be exposed to challenges derived from principles of contract interpretation and restrictions on the scope of liability limitation or exclusions taken from the Civil Code.

Consistent with this, there is a deemed validation procedure if the Engineer fails to notify the claiming Party that it is outside the relevant timeframe and also a mechanism by which the Party can challenge the invalidity of its Notice of Claim, requiring

the Engineer to consider their position and allow the late submission if it is justified in the circumstances.

Both Parties should however be careful to ensure they comply with the relevant timeframes under cl. 3.7 and 20. The UAE federal law provides in relation to a commercial contract that "*whatever is agreed between the two parties shall apply*" (Code of Commercial Practice, Article 2). Likewise, a party to a civil contract must "*perform that which he obliged to do under the Contract*" (UAE Civil Code, Article 243(2)) In principle and in practice, the UAE courts apply the agreement of the parties as recorded in writing.



Disputes and arbitration

“Dispute” (Cl. 1.1.29) A “Dispute” is now defined. Failure by the respondent party or the Engineer to oppose or respond to a claim in whole or part may constitute a rejection of claim (thereby crystallising a “Dispute”) if in the circumstances the DAAB or an arbitrator deem it reasonable to do so. The definition is far from straightforward and will inevitably lead to disputes about what constitutes a “Dispute”. Disputes have been “hived off” to their own chapter (Clause 21) of the contract.

The “DAAB” Amendments to the new “Dispute Avoidance / Adjudication Board” (DAAB) provisions have been made to promote good contract management. Key changes include:

- The DAAB is appointed as a standing board with a dispute avoidance function. The DAAB may now provide ‘informal assistance’, if the parties jointly request it, under new ‘Avoidance of Disputes’ provisions. The parties are not bound to act on the DAAB’s advice and the DAAB is not bound in any future dispute by views given during this informal process. This process is not available when the Engineer is making a determination.
- A 42-day time bar applies to the reference of disputes to the DAAB following the issue of a NOD in relation to an Engineer’s determination.
- A 28-day time bar applies to the issue of a NOD following a determination by the DAAB: otherwise the DAAB’s decision shall become final and binding. However, there is no time bar to referring disputes to arbitration following issue of such a NOD.
- A party may refer a failure to comply with any DAAB decision directly to arbitration, and the arbitral tribunal is granted the power to order the enforcement of that decision. There is a question as to whether an award endorsing a DAAB decision without reviewing the underlying merits could withstand a challenge to

enforcement based on the public order ground that justice must be administered only pursuant to processes that have statutory recognition.

Whilst these amendments are welcome, DAB clauses are commonly struck out of construction contracts in the Gulf notwithstanding that this cuts across FIDIC’s Golden Principle No. 5 which requires that *“all formal disputes must be referred to a Dispute Avoidance Board for a provisionally binding decision as a condition precedent to arbitration.”* In the absence of sanctions that attach to any “breach”, the principle constitutes only guidance on modifying FIDIC conditions rather than a requirement to which the parties must adhere.

Amicable settlement (Cl. 21.5) This provision mirrors Clause 20.5 of the 1999 Red Book but the time period for amicable settlement has been reduced from 56 days to 28 days.

Arbitration (Cl. 21.6) ICC arbitration has been retained. The routes to arbitration are four-fold:

- (i) issue of a NOD followed by an attempt to amicably settle the Dispute;
- (ii) any failure to comply with a DAAB decision;
- (iii) any failure to comply with an agreement or a final and binding determination of the Engineer; or
- (iv) no DAAB has been put in place.

In an attempt by FIDIC to incentivise parties to utilise the DAAB procedure, the arbitrator(s) may now take account of the extent to which a party has failed to cooperate with the other party in constituting a DAAB in making an award on costs. The arbitrators have a power to open up an Engineer’s determination or DAAB decision relevant to a Dispute unless the determination or decision is final and binding. Any award requiring payment from one party to the other is immediately due and payable without further certification or Notice.

Key considerations for Saudi Arabia

Legal interpretation of the 2017 Red Book in Saudi Arabia requires separate consideration because the KSA has a fundamentally different legal system to all of the other GCC states. While all GCC states have a civil code that is derived from Islamic Law / Shari'ah (including specific chapters for construction-type contracts), KSA law requires contracts to be interpreted by reference to the underlying Shari'ah. This means that principles set out in extracts from the Qur'an, the Sunna and related jurisprudential texts will be applied directly to the clauses of the 2017 Red Book.

In short, the 2017 Red Book used on Saudi projects is likely to result in a slightly different risk allocation for contractors than the same contract being used in other GCC states. One example of this is the detailed notice requirements set out in the new Red Book. These would seem to offend the Shari'ah principle than "a just claim never dies" and therefore claims that would otherwise exist under Shari'ah (which importantly may not be all claims under the contract) may not be limited by notice clauses. Also the reference to set percentage of profit may not be enforceable in KSA, in so far as Shari'ah does not permit the recovery of compensation that is uncertain or speculative. Binding determinations by the Engineer or decisions of the DAAB that give rise to termination rights are also likely to be problematic.

That said, it is likely that the 2017 Red Book will be embraced in Saudi Arabia. The Saudi government is pursuing an unprecedented program of economic and social change at present, at the heart of which is its Vision 2030 program. One aspect of this is the new Government Tenders & Procurement Law likely to come into force in 2018 and the new standard form contracts that are prescribed for use by government departments. It is very likely that the 2017 Red Book will influence the development of such standard forms and that many of the principles set out in this paper will become common practice in the Kingdom.



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