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**IFRS 15 legal  
implications**

**Dispute resolution  
processes**

**Contract  
repudiation**



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**4,300**  
Twitter  
followers



**550**  
individuals  
trained



**46**  
grant-  
funded  
projects



**32**  
countries



**5**  
continents



**£100,000**  
awarded  
for IBAHRI  
Trust intern  
scholarships



**25**  
intervention  
letters



**20**  
legal  
consultants



**5**  
reports  
published



**3**  
trial  
observers



**1**  
mission  
rapporteur





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Cover: The Swiss Federal Supreme Court, Lausanne, Switzerland.  
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comparison to this relatively small procedural issue. Nevertheless, it is foreseeable that Engineers, DABs and even national courts may take differing views on resolving the current drafting, if required to do so. As a result, a bespoke amendment is likely to be appropriate to avoid unnecessary procedural difficulties arising.

#### Notes

- 1 This article uses the 2017 Red and Yellow book references. See FIDIC (International Federation of Consulting Engineers), Conditions of Contract for Construction, 2nd Edn (FIDIC 2017); FIDIC (International Federation of Consulting Engineers),

Conditions of Contract for Plant & Design-Build, 2nd Edn (FIDIC 2017).

- 2 It is worth noting, although not directly relevant to this article, that the validity of the Notice of Claim is subject to two deeming processes under Sub-Clause 20.2.4 in relation to this time-bar. The Notice of Claim is first deemed to have lapsed on the expiry of 84 days, if there is a failure to provide the required statement, and then deemed valid again 14 further days after that, provided the Engineer does not issue Notice of time-barring.

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## CLAIMS PROCEDURE AND DISPUTE RESOLUTION UNDER THE REVISED FIDIC CONDITIONS

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### Introduction

The overall claim and dispute resolution framework has not changed in the most recent 2017 editions of the FIDIC Red Book (Conditions of Contract for Construction), Yellow Book (Conditions of Contract for Plant and Design Build) and Silver Book (Conditions of Contract for EPC/Turnkey Projects) (the 'revised FIDIC Conditions'). The main steps, as in the editions originally published in 1999, are: (1) notify the engineer of a claim; (2) the engineer's determination; (3) refer the claim to the dispute adjudication board (DAB) for decision; (4) attempt amicable settlement through negotiations; and (5) as a last resort, International Chamber of Commerce (ICC) arbitration.

However, there have been a number of important changes within this pre-existing framework. Most notably, the revised FIDIC Conditions separate claim provisions from dispute resolution provisions and provide a more detailed procedure for both. What was previously Clause 20 ('Claims, Disputes and Arbitration') has been divided into two distinct – and more comprehensive – clauses: a revised Clause 20 ('Employer's and Contractor's Claims'), which addresses the claim process for both employer's and contractor's claims; and a new Clause 21 ('Disputes and Arbitration'), specifically addressing dispute resolution.

The reason for this division is to make clear that submitting a claim does not automatically give rise to a dispute. To put forward a 'Claim' (defined in Sub-Clause 1.1.6) is to make a request for an entitlement under the contract; a 'Dispute' (defined in Sub-Clause 1.1.29) arises only if that claim is rejected, in whole or in part, or no determination is made. This is intended to avoid an unnecessary escalation of issues, with parties jumping straight to arbitration; instead, they must follow the mechanics of the new Clauses 20 and 21.

### Changes to notice requirements

The revised FIDIC Conditions include additional notice provisions intended to help the parties address claims promptly in order to avoid disputes as far as possible. The term 'Notice' is now specifically defined as a 'written communication identified as a Notice and issued in accordance with Sub-Clause 1.3' (Sub-Clause 1.1.56). In addition, notice is now specifically required under numerous Sub-Clauses, which also explain in greater detail how and when such notice must be given (see eg, Sub-Clauses 4.7.2 and 4.12.1).

These provisions are designed to ensure that it is clear when a party is making a claim and to avoid the situation of a party trying to seek a tactical advantage by hiding a claim notice in day-to-day communications or failing to provide timely notice and later searching the project record for any communication that may be construed as notice. To this end, Sub-Clauses 4.20 and 8.3 of the revised FIDIC Conditions even expressly provide that progress reports and programmes cannot constitute notice.

It remains to be seen whether the more extensive notice requirements

will encourage parties to address potential claims when they arise or whether these provisions will ultimately lead to more disputes.

### Changes to the claim procedure (Clause 20)

The claim procedure, as set out in the new Clause 20, is now aligned for employer and contractor's claims. Both the employer and contractor are subject to the same time limits and time-bars for claims, including the familiar 28-day time limit for the Notice of Claim (Sub-Clause 20.2.1) and an increased 84-day time limit for submission of the 'fully detailed Claim' (Sub-Clause 20.2.4). Both parties must therefore be aware of, and able to manage this procedure, and understand the potential impact on their right to monetary or time-related relief if this procedure is not followed.

Sub-Clause 20.1 expressly distinguishes between three categories of claim, now defined as 'a request or assertion by one Party to the other Party for an entitlement or relief under any Clause of these Conditions or otherwise in connection with, or arising out of, the Contract or the execution of the Works' (Sub-Clause 1.1.6): (1) claims for additional payment (or reduction in the contract price); (2) claims for extension of time; and (3) claims for an entitlement or relief other than for money or time.

Claims falling within the first two categories (ie, payment or an extension of time) must follow the procedure set out in Sub-Clause 20.2, consisting of: (1) a Notice of Claim; (2) a fully detailed claim; and (3) the engineer's agreement or determination. Claims falling within the third category of 'other' claims are subject to a much shorter procedure; they are simply referred to the engineer for agreement or determination (pursuant to Sub-Clause 3.7).

Sub-Clause 20.2.2 includes a new requirement for the engineer to notify the claiming party within 14

days of receipt of the Notice of Claim if the engineer considers the claim to be time-barred. If the engineer fails to do so, the party's Notice of Claim shall be deemed valid. Nonetheless, the other party may, in turn, challenge that decision or indeed challenge the deemed acceptance of the Notice of Claim, in which case the engineer shall review the issue when making a determination with respect to the claim.

Following the fully detailed claim, the next step is the engineer's determination. The revised FIDIC Conditions require that, if a party is dissatisfied with the engineer's determination, it must give a 'Notice of Dissatisfaction' (NOD) within 28 days. Otherwise, the determination becomes final and enforceable directly through arbitration (Sub-Clause 3.7.5). The filing of a NOD triggers the DAB procedure, which must be commenced within 42 days after service of the NOD.

### Changes to the dispute resolution procedure (Clause 21)

The new Clause 21 focuses on dispute avoidance prior to dispute adjudication. Reflecting this priority, the DAB has been renamed the Dispute Avoidance/Adjudication Board (DAAB) (Sub-Clause 1.1.22). In addition, the new DAAB Procedural Rules state explicitly that the first objective of the DAAB is 'to facilitate the avoidance of Disputes' (Rule 1.1(a)).

To more effectively prevent claims from becoming disputes, the 2017 editions of the Red Book, Yellow Book and Silver Book all provide for standing DABs, in place for the duration of the contract. The new DAAB Procedural Rules require the DAAB to meet with the parties regularly and visit the site outside the context of any formal proceedings (Rule 3). In addition, the parties may jointly request the DAAB to 'provide assistance and/or informally discuss'

with the parties in an attempt to resolve issues, that is, effectively exercising a mediation function (Sub-Clause 21.3).

If a dispute is referred to the DAAB, the DAAB must issue a written and reasoned decision within 84 days (Sub-Clause 21.4.3). The DAAB's decision is binding and immediately enforceable, regardless of whether a party objects (Sub-Clause 21.4.3). Under Clauses 15 and 16, non-compliance with a DAAB decision is a ground for termination by either party or suspension by the contractor (Sub-Clauses 15.2.1(a)(iii); 16.1(d)(ii) and 16.2.1(d)(ii)).

If a party does not accept the DAAB's decision, it must issue a NOD within 28 days of the decision (Sub-Clause 21.4.4). If a party issues a NOD, the parties must attempt to settle the dispute amicably before the commencement of arbitration; however, the time period for amicable settlement negotiations has been reduced to 28 days (Sub-Clause 21.5).

The final step is ICC arbitration. The arbitral tribunal has the power to enforce the DAAB decision by issuing interim or provisional measures or a partial award (Sub-Clause 21.7).

### Conclusion

Overall, the changes made in the revised FIDIC Conditions provide additional certainty through more detailed and stricter requirements. This is, in principle, beneficial, but places a greater administrative burden on the parties. The revised FIDIC Conditions may require some training, including for contract and claims managers who must understand and be fully aware of the more complex procedure for claims and dispute resolution.

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