



The Guide to Construction Arbitration - Sixth Edition

**Over the rainbow: FIDIC's Second
Edition Red, Yellow and Silver Books**

The Guide to Construction Arbitration - Sixth Edition

Edited by academics who teach construction contracts and arbitration at the School of International Arbitration in London, GAR's Guide to Construction Arbitration pulls together both substantive and procedural sides of the subject in one volume. Across four parts, it moves from explaining the mechanics of FIDIC contracts and particular procedural questions that arise at the disputes stage, to how to organise an effective arbitration, before ending with a section on the specifics of certain contracts and of key countries and regions. The chapters are written by leaders in the field from both the civil and common law worlds and other relevant professions.

This sixth edition is fully up to date with the new FIDIC suites and includes chapters on expert witnesses, claims resolution, dispute boards, ADR, agreements to arbitrate, investment treaty arbitration and Canada. It is a must-have for anyone seeking to improve their understanding of construction disputes or construction law..

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Over the rainbow: FIDIC's Second Edition Red, Yellow and Silver Books

Ellis Baker and **Rebecca Major**

White & Case

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INTRODUCTION

In December 2017, 18 years after the Fédération Internationale des Ingénieurs-Conseils^[1] (FIDIC) released the first editions of its Rainbow Suite of contracts in 1999 (the First Editions), FIDIC published the second editions. These comprised the Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer (the Red Book), the Conditions of Contract for Plant and Design-Build for Electrical & Mechanical Plant, and for Building and Engineering Works, Designed by the Contractor (the Yellow Book) and the Conditions of Contract for EPC/Turnkey Projects (the Silver Book). The introduction of the 2017 Rainbow Suite was a significant landmark in the development of international contracting for major infrastructure projects worldwide.

Since the publication of the 2017 Rainbow Suite, FIDIC has made three sets of amendments to the second editions.^[2] These amendments were combined and incorporated into an updated version of the 2017 Rainbow Suite,^[3] which was released in November 2022 at the FIDIC Contract Users' Conference in London, together with the FIDIC 2017 Contracts Guide. The 2017 Rainbow Suite, as updated in 2022 (the Second Editions), are the definitive versions of FIDIC's Rainbow Suite and are the versions discussed in the FIDIC 2017 Contracts Guide (the Guide).

The Second Editions adopt the same procurement models as were used in the First Editions: the Second Edition of the Red Book is FIDIC's employer design contract, the Second Edition of Yellow Book has the dual function of design-and-build/contractor design and electrical and mechanical plant procurement, and the Second Edition of Silver Book is FIDIC's engineering, procurement and construction (EPC)/turnkey contract. While the Guide describes the Second Editions as 'updates',^[4] the First Editions have been substantially revised, and the Second Editions represent a significantly different proposition for a prospective user to consider.

DESCRIBING THE RAINBOW

RED BOOK

The Red Book is not only the oldest of the FIDIC contracts^[5] – celebrating its 68th anniversary in 2025 – but also the most widely used for general construction projects of many kinds. As is clear from its full title, the Red Book is an employer design contract. The design, prepared by the Employer's staff or by consultants acting on its behalf, is provided to the Contractor in the form of Specifications and Drawings, as well as any Schedules.

The Red Book is a remeasurement contract in which the Contract Price is determined in accordance with the measurement and valuation of the Works.^[6] It is open to the Parties to vary this position, and, in practice, the Red Book is frequently converted into a lump-sum contract. The extent to which this is feasible depends on both the nature of the Works and the extent to which the Employer's design is complete at the time of tender. FIDIC has provided example provisions to convert the Red Book into a lump-sum contract.^[7] This was also the case in the First Edition.^[8]

The Employer is obliged to appoint an Engineer 'who shall carry out the duties assigned to the Engineer in the Contract'.^[9] The Engineer shall be 'a professional engineer having suitable qualifications, experience and competence to act as the Engineer under the Contract' and

shall be 'fluent in the ruling language defined in Sub-Clause 1.4'.^[10] The Engineer is paid by, and appointed under, a separate consultancy agreement with the Employer.

The Engineer has a dual role under the Contract, acting both as agent to the Employer (e.g., when issuing instructions under Sub-Clause 3.5 and Variations under Sub-Clause 13.3) and as decision-maker (e.g., when issuing Interim Payment Certificates under Sub-Clause 14.6, and consulting with the Parties or determining Claims by either Party under Sub-Clauses 20.2.5 and 3.7).^[11] Except as otherwise stated, the Engineer, whenever carrying out duties or exercising authority under the Contract, shall act 'as a skilled professional and shall be deemed to act for the Employer'.^[12]

When issuing Interim Payment Certificates, the Engineer is required to state the amount that it 'fairly considers to be due'.^[13] When consulting with the Parties and when making determinations under Sub-Clause 3.7 [Agreement or Determination], the Engineer must act neutrally, and it is not deemed to act for the Employer.^[14] FIDIC explains this new obligation on the Engineer as a duty to treat both Parties 'even-handedly, in a fair minded and unbiased manner'.^[15] Ultimately, the effect of the obligation to act 'neutrally' will be determined by the governing law of the Contract.

There was a similar arrangement under the First Editions, although the Engineer was not under any express obligation to act neutrally or impartially when acting as decision maker.^[16] Such an obligation may, however, have been implied under the governing law.

The dual role of the Engineer has been adopted for many years in common law contracts; however, this concept is unknown to French and civil law generally.^[17]

YELLOW BOOK

The Yellow Book is FIDIC's second-oldest contract^[18] and is widely used in design and build projects. As with the Red Book, the Yellow Book's most important feature is contained within its full title: it is a contractor design contract. The design is prepared by the Contractor in accordance with the Employer's requirements, which specify 'the purpose(s) for which the Works are intended . . . Key Personnel (if any), the scope, and/or design and/or other performance, technical and evaluation criteria, for the Works'.^[19] The Contractor accepts a fitness for purpose obligation for the completed Works.^[20]

The Yellow Book is a lump-sum contract, and the Contractor is typically paid interim payments of the lump-sum Contract Price as the Works proceed.^[21] There are alternative payment mechanisms, such as a Schedule of Payments specifying the instalments in which the Contract Price will be paid,^[22] which is often adopted for payment on the completion of milestones, and payment for Plant and/or Materials that have been shipped or delivered to Site.^[23] The Red Book and the Yellow Book are both administered by the Engineer and adopt what FIDIC considers to be a 'fair and balanced' allocation of risk between the Employer and the Contractor.^[24]

SILVER BOOK

The Silver Book is the third of the major Rainbow Suite of contracts, and its First Edition was published in 1999. The Silver Book is a lump-sum EPC turnkey contract. It was the most controversial upon its launch and, to some extent, remains so. As with the Yellow Book, the design is prepared by the Contractor in accordance with the Employer's Requirements.^[25] Unlike the Yellow Book, in the Silver Book, the Contractor is generally responsible for the

accuracy of the Employer's Requirements,^[26] for verifying all Site data made available by the Employer^[27] and for Unforeseeable difficulties.^[28]

This form of contracting is typically used on complex engineering facilities, such as process or power plants, where a high degree of certainty as to cost, time and performance is required, often because of 'bankability' issues in funding the project. The concept is that the Employer obtains a fully functioning facility, capable of operating immediately to guaranteed standards of performance (i.e., ready at the 'turn of a key').

The Silver Book, unlike the Red and Yellow Books, is not administered by an Engineer; instead, in the Second Edition Silver Book, the Employer is obliged to appoint an Employer's Representative who, except as otherwise stated in the Contract, is deemed to act on the Employer's behalf under the Contract.^[29] Unlike the Engineer in the Second Edition Red and Yellow Books, the Silver Book does not specify that the Employer's Representative shall have any particular qualifications beyond being competent to carry out its duties and exercise its authority. The Employer's Representative has a broad role and is vested with and deemed to have 'the full authority of the Employer under the Contract'^[30] unless and until the Employer notifies the Contractor otherwise, and except in respect of Clause 15 [Termination by the Employer].^[31] When acting in the agreement or determination role, the Employer's Representative is not deemed to act for the Employer; however, the Silver Book does not include any requirement for the Employer's Representative to act neutrally.

By contrast, under the First Edition Silver Book,^[32] the Employer was entitled, but was not obliged, to appoint an Employer's Representative to act on its behalf under the Contract.

PRODUCT

FITNESS FOR PURPOSE

The Second Edition Yellow and Silver Books^[33] contain fitness for purpose obligations that apply even where no purpose is expressly stated.^[34] Under Sub-Clause 4.1 of the Yellow and Silver Books, when completed, the Works – or a Section (or Part (Yellow Book)) or major item of the Plant (if any) – 'shall be fit for the purpose(s) for which they are intended, as defined and described in the Employer's Requirements',^[35] however, where the purpose is not defined and described in the Employer's Requirements, the Contractor is not relieved of its 'fitness for purpose' obligations. Instead, by default, the Works – or a Section (or Part (Yellow Book)) or major item of the Plant (if any) – shall be 'fit for their ordinary purpose(s)'.^[36]

In some cases, the 'ordinary purpose' may be deduced from the Employer's Requirements. In other cases, however, the scope of the 'ordinary purpose' may be unclear. This may result, on the one hand, in the Contractor undertaking an obligation that it had not expected; equally, however, the scope of the 'ordinary purpose' may be construed in a narrower manner than the Employer had expected, resulting in the Employer not having the benefit of an obligation that it thought it had.

In the Second Edition Yellow and Silver Books,^[37] the Contractor's fitness for purpose obligation is also supported by an indemnity given by the Contractor in respect of all acts, errors or omissions by the Contractor in carrying out the Contractor's design that result in the Works – or a Section (or Part (Yellow Book)) or major item of the Plant (if any) – not being fit for the purposes for which they are intended under Sub-Clause 4.1.^[38] This indemnity is subject to the exclusion of 'loss of use of any Works, loss of profit, loss of any contract or for any indirect or consequential loss or damage which may be suffered by the other Party

in connection with the Contract^[39] and to the overall limit on the Contractor's liability under Sub-Clause 1.15 (Yellow Book) and Sub-Clause 1.14 (Silver Book).

The Contractor is also obliged, if required by the Contract Data, to effect and maintain professional indemnity insurance against liability arising from any act, error or omission by the Contractor in carrying out the Contractor's design obligations under the Contract that results in the Works – or a Section (or Part (Yellow Book)) or major item of the Plant (if any) – not being fit for the purposes for which they are intended under Sub-Clause 4.1.^[40]

The First Edition Yellow and Silver Books contained^[41] limited fitness for purpose obligations, which did not apply if the purpose was not defined in the Contract.

PERFORMANCE DAMAGES

A further significant addition to the Second Edition Yellow and Silver Books is the inclusion of an entitlement of the Employer to payment of performance liquidated damages. 'Performance Damages'^[42] are defined in the Second Edition Yellow and Silver Books as damages to be paid by the Contractor to the Employer for the failure to achieve the guaranteed performance of the Plant or Works, or any part of the Works, as set out in the Schedule of Performance Guarantees.

The Employer's entitlement to payment arises in two scenarios in the Second Edition Yellow and Silver Books:

- First, under Sub-Clause 9.4, if the Works or a Section fails to pass the Tests on Completion repeated under Sub-Clause 9.3 [Retesting] and the Employer requests the issue of a Taking Over Certificate, the Employer will either be entitled to payment of Performance Damages in full satisfaction of this failure^[43] or, alternatively, a reduction in the Contract Price.^[44]
- Second, if the Works or a Section fails any of or all the Tests after Completion where the applicable Performance Damages are set out in the Schedule of Performance Guarantees, then the Employer will be entitled to payment of Performance Damages by the Contractor in full satisfaction of this failure.^[45] Further, where the Contractor pays Performance Damages to the Employer in the Defects Notification Period (DNP), then the Works or Section will be deemed to have passed the Tests after Completion.^[46]

The approach adopted in the Second Edition Red Book differs from the approach taken in the Second Edition Yellow and Silver Books. Under Sub-Clause 9.4 of the Second Edition Red Book, the Employer is entitled to a reduction in the Contract Price in the event the Works or a Section fails to pass the Tests on Completion repeated under Sub-Clause 9.3 [Retesting] and the Employer requests the issue of a Taking Over Certificate.^[47]

In the First Editions of the Yellow and Silver Books, if the Works or any Section failed to pass any Test on Completion repeated under Sub-Clause 9.3 [Retesting] and the Employer had requested to issue the Taking Over Certificate, the Contract Price was to be 'reduced by such amount as shall be appropriate to cover the reduced value to the Employer as a result of the failure'.^[48] If the Works or a Section failed to pass any of or all the Tests after Completion, such failure constituted a pass where the relevant sum payable as non-performance damages for such failure was stated (or its method of calculation was defined) in the Contract, and the Contractor had paid this sum to the Employer during the DNP.^[49] Under the First Editions of

the Yellow and Silver Books, the Contractor was under no obligation to pay non-performance damages.

DNP AND LATENT DEFECTS

In both the Second Editions^[50] and First Editions^[51] the DNP is stated to be one year unless otherwise specified in the Contract Data.^[52] By the expiry date of the DNP, or as soon as practicable thereafter, the Contractor is required to have completed any outstanding work listed in the Taking Over Certificate and remedied any defects or damage notified to the Contractor by, or on behalf of, the Employer before the expiry date of the DNP.^[53] While the Employer is entitled to an extension to the DNP in certain circumstances, the DNP shall not be extended by more than two years under both the Second Editions and First Editions.^[54]

In both editions, after the issue of the Performance Certificate, 'each Party shall remain liable for the fulfilment of any liability which remains unperformed at that time'.^[55] Subject to the governing law, the Contractor may continue to be liable for latent defects that existed prior to the expiry of the DNP but that only became apparent after the expiry of the DNP or issue of the Performance Certificate.

In respect of the Plant, in the Second Editions, the Contractor shall not be liable for any defects or damage occurring more than two years after expiry of the DNP for the Plant except if 'prohibited by law or in any case of fraud, gross negligence, deliberate default or reckless misconduct'.^[56] An equivalent limitation was not included in the First Editions.

TIME

OBLIGATIONS

In the Rainbow Suite, the Contractor's obligations as to time can essentially be divided into two separate, but related, obligations:

- an obligation to complete the Works and any Sections within the relevant Time for Completion,^[57] and
- an obligation to proceed with 'due expedition and without delay'.^[58]

The Contractor also has an obligation to proceed in accordance with the 'Programme',^[59] subject to the Contractor's other obligations under the Contract.^[60]

PROGRAMME

The Second Editions contain more prescriptive programming provisions compared to the First Editions.^[61] 'Programme' is defined in the Second Editions as 'a detailed time programme prepared and submitted by the Contractor to which the Engineer^[62] has given (or is deemed to have given) a Notice of No-objection'.^[63] There is a requirement for the Contractor to use 'programming software'^[64] and to identify all activities^[65] logically linked and showing the earliest and latest start and finish dates for each activity, the float (if any) and the critical path(s).^[66] The Contractor's monthly progress reports must also include comparisons of actual and planned progress, with details of any events or circumstances that may adversely affect the completion of the Works in accordance with the Programme, and the measures being (or to be) adopted to overcome delays.^[67]

As was the case under the First Editions,^[68] the Programme is to be accompanied by a supporting report, which must include details showing the Contractor's reasonable estimate

of the number of each class of Contractor's Personnel and of each type of Contractor's Equipment required on the Site for each major stage of the execution of the Works.^[69]

DELAY DAMAGES

If the Contractor fails to complete the Works or Section (if any) within the Time for Completion, in the Second Editions the Employer shall be entitled to payment of Delay Damages.^[70] The total amount due shall not exceed the maximum amount of Delay Damages (if any) stated in the Contract Data.^[71] The Contractor's liability for Delay Damages is not limited in any case of 'fraud, gross negligence, deliberate default or reckless misconduct' by the Contractor,^[72] there was no equivalent provision in the First Editions.

Under Sub-Clause 15.2.1 of the Second Editions, the Employer is entitled to terminate the Contract in circumstances where the maximum amount of Delay Damages stated in the Contract Data is exceeded. The First Editions did not include an equivalent entitlement.

EXCEPTIONAL EVENTS

Clause 18 [Exceptional Events] of the Second Editions introduces the term 'Exceptional Event', which replaces the definition of 'Force Majeure' found in Clause 19 [Force Majeure] of the First Editions. An 'Exceptional Event' is broadly similar to a 'Force Majeure' in the First Editions.^[73] If the Contractor suffers delay or incurs cost by reason of the 'Exceptional Event', the Contractor shall be entitled to an extension of time or, in certain circumstances, Cost.^[74] Either Party has the right to terminate the Contract if the execution of substantially all the Works in progress is prevented for a continuous period of 84 days by reason of an 'Exceptional Event' or multiple periods that total more than 140 days because of the same 'Exceptional Event'.^[75] In the event of such a termination, the Contractor is entitled to payment of the value of work done, including demobilisation costs.^[76] A similar risk allocation existed in the First Editions with respect to 'Force Majeure'.^[77]

Under Sub-Clause 17.2(e) of the Second Editions, the Contractor shall have no liability, whether by way of indemnity or otherwise, for loss or damage to the Works, Goods or Contractor's documents caused by an 'Exceptional Event'. Additionally, under Sub-Clause 19.2.1(iv) of the Second Editions, the insurance cover provided by the Contractor for the Works may exclude, among other things, the risks arising from Exceptional Events unless otherwise stated in the Contract Data.

By contrast, the First Editions included a defined list of Employer's Risks under Sub-Clause 17.3, but did not provide that all events of Force Majeure were Employer's Risks. The insurance for the Works under Sub-Clause 18.2 did not generally include loss and damage caused by the defined list of Employer's Risks under Sub-Clause 17.3. To the extent that events of Force Majeure were not listed within the defined list of Employer's Risks, such events of Force Majeure were to be included within the insurance for the Works under Sub-Clause 18.2, unless otherwise stated in the Particular Conditions.

When using the Second Editions, the Parties' insurance advisors must consider whether the general exclusion of cover in the Works insurance for all Exceptional Events in Sub-Clause 19.2.1(iv) is appropriate or whether a provision should be included in the Contract Data to limit the exclusion to certain specified events.

LIMITATIONS OF LIABILITY

Under the First and Second Editions, the Contractor's total liability under or in connection with the Contract shall generally not exceed the sum stated in the Contract Data^[78] or, if not stated, the Accepted Contract Amount (Red and Yellow Books) or the Contract Price stated in the Contract Agreement (Silver Book).^[79] Neither Party is, in general, liable to the other for 'loss of use of any Works, loss of profit, loss of any contract or for any indirect or consequential loss or damage'.^[80] Under the Second Editions these limitations of liability do not apply in circumstances of 'fraud, gross negligence, deliberate default or reckless misconduct' by the defaulting Party.^[81] An equivalent provision existed in the First Editions,^[82] albeit it did not include 'gross negligence'.

The inclusion of gross negligence in the events that cause limitations of liability to cease to apply is frequently a sensitive matter for both Parties. This is because, in practice, it may often be difficult to decide whether an act of negligence is sufficiently serious to constitute gross negligence, even though the liability consequences of negligence being categorised as gross negligence are very significant.

AGREEMENT OR DETERMINATION

Sub-Clause 3.7 of the Second Edition Red and Yellow Books represents a significant change to Sub-Clause 3.5 of the First Edition Red and Yellow Books and now prescribes a timetable for the Engineer's consultations with both Parties and determinations. Under Sub-Clause 3.7.1, the Engineer shall first consult with both Parties jointly or separately and shall encourage discussion between the Parties in an endeavour to reach agreement. If agreement is achieved, the Engineer shall give both Parties Notice of the Parties' agreement within 42 days.^[83] If an agreement is not achieved, the Engineer shall make a determination of the matter,^[84] and shall give Notice of its determination to the Parties within 42 days.^[85] Consequently, 84 days may elapse before the Engineer has made a determination.

An equivalent provision exists in Sub-Clause 3.5 of the Second Edition Silver Book, where the Employer's Representative consults with both Parties and issues determinations.

Sub-Clause 3.5 of the First Editions was absent any timetable for agreements and determinations, which had the potential to result in an open-ended process.

In the Second Edition Red and Yellow Books, the Engineer has a duty to make 'a fair determination of the matter or Claim, in accordance with the Contract, taking due regard of all relevant circumstances'.^[86] The Employer's Representative in the Second Edition Silver Book has an equivalent duty.^[87] The Engineer under the First Edition Red and Yellow Books, and the Employer under the First Edition Silver Book, also had an equivalent duty.^[88]

Under Sub-Clause 3.7.4 (Red and Yellow Books) and Sub-Clause 3.5.4 (Silver Book) of the Second Editions, each agreement or determination is binding on the Parties unless and until it is corrected under Sub-Clause 3.7 (Red and Yellow Books) or Sub-Clause 3.5 (Silver Book) or, in the case of a determination, it is revised under the dispute resolution procedures in Clause 21.^[89] In the Second Editions, in respect of a determination, if no Notice of Dissatisfaction is given by either Party within 28 days, then the determination becomes final and binding.^[90] This is a significant change to the First Editions, which did not include any equivalent provision.

Sub-Clause 3.5 of the First Edition Silver Book differed from the First Edition Red and Yellow Books in that each Party was required to give effect to each agreement or determination 'unless the Contractor gives notice, to the Employer, of his dissatisfaction with

a determination within 14 days of receiving it'.^[91] Either Party could then refer the dispute to the dispute adjudication board (DAB) in accordance with Sub-Clause 20.4 [Obtaining Dispute Adjudication Board's Decision].^[92]

CLAIMS

The claims procedure in the Second Edition Rainbow Suite is very different from the First Editions. The claims procedure prescribed by Clause 20 of the Second Editions applies to both Contractor and Employer 'Claims'.^[93] The claiming Party is required to give a Notice of Claim within 28 days after it became aware, or should have become aware, of the event or circumstance giving rise to the Claim.^[94] If the claiming Party fails to submit a Notice of Claim within the 28 day period, the Claim will be time-barred.^[95] The claiming Party must also provide a fully detailed Claim within 84 days after it became aware, or should have become aware, of the event or circumstance giving rise to the Claim.^[96]

The claiming Party may in its fully detailed Claim give details of why the late submission of its Notice of Claim or its statement of the contractual and/or other legal basis of the Claim is justified. After receiving the fully detailed Claim, the Engineer (Red or Yellow Books) or Employer's Representative (Silver Book) shall proceed to agree or determine the Claim. The agreement or determination shall include whether or not the Notice of Claim shall be treated as valid, taking into account the details included in the fully detailed Claim as to why the late submission of the Notice of Claim or the statement of the contractual and/or other legal basis of Claim is justified. The effect of the time limits for submission of the fully detailed Claim and the process for the agreement and determination of the Claim is such that 168 days^[97] may elapse between the 'event or circumstance' and the determination of the Claim.

The claims procedure in the First Editions was much more streamlined in comparison to the Second Editions. The First Editions adopted different processes for Contractor and Employer claims. Contractor claims were subject to a time-bar provision, by which failure to give notice of a claim within 28 days after the Contractor became aware, or should have become aware, of the event or circumstance giving rise to the claim would result in the Contractor losing its entitlement to an extension of time or additional payment;^[98] by contrast, the Employer only had to make a notice of claim 'as soon as practicable'.^[99] The Contractor's fully detailed claim was due within 42 days after the it 'became aware (or should have become aware) of the event or circumstance giving rise to the claim'.^[100]

TERMINATION

TERMINATION FOR DEFAULT

In the First and Second Editions, both the Employer and the Contractor are entitled to terminate the Contract for certain specified defaults by the other Party.

In the Second Editions, if the Employer terminates for default, it is entitled to payment of the additional costs of executing the Works, all other costs reasonably incurred and any losses and damages suffered by the Employer in completing the works.^[101] The Employer's entitlements are subject to the exclusion of indirect or consequential loss and damage and the overall cap on the Contractor's liability under Sub-Clause 1.15 (Red and Yellow Books) and Sub-Clause 1.14 (Silver Book). The Employer is entitled to withhold further payment to the Contractor until these sums are established.

In addition, in the Second Editions, if the Employer is deprived of substantially the whole benefit of the Works because of the Contractor's failure to remedy a defect or damage,

under Sub-Clause 11.4(d), the Employer may terminate the Contract. In this case, the Employer may recover all sums paid for the Works, plus financing charges and any costs incurred in dismantling the Works, clearing the Site and returning Plant and Materials to the Contractor.^[102] The same remedies arise if the Works fail to pass the Tests on Completion, repeated under Sub-Clause 9.3,^[103] and the effect of the failure is to deprive the Employer of substantially the whole benefit of the Works.

If the Contractor terminates for default, under Sub-Clause 16.4 of the Second Editions, the Contractor is entitled to payment on the same basis as when the Contract is terminated for an Exceptional Event,^[104] together with the amount of any loss of profit and any other losses and damages suffered by the Contractor as a result of the termination. The Contractor's entitlements under Sub-Clause 16.4 are not subject to the exclusion of indirect or consequential loss and damage under Sub-Clause 1.15 (Red and Yellow Books) and Sub-Clause 1.14 (Silver Book).

The Employer and the Contractor had broadly similar remedies under the First Editions.^[105]

TERMINATION FOR CONVENIENCE

Under Sub-Clause 15.5 of both the First Editions and the Second Editions, the Employer is entitled to terminate the Contract for convenience. Under the Second Editions, the Contractor broadly has the same entitlement to payment as when the Contractor terminates for Employer default. By contrast, under the First Editions, the Contractor's entitlement was the same as when the Contract was terminated for Force Majeure.

DISPUTE AVOIDANCE AND RESOLUTION

The Second Editions place greater emphasis on dispute avoidance. All three books adopt a standing Dispute Avoidance/Adjudication Board (DAAB), which, if the Parties jointly request in writing, has express powers to provide assistance and/or informally discuss and attempt to resolve any issue or disagreement that has arisen between the Parties to prevent a 'Dispute'^[106] from arising.

As was the case in the First Editions, in the Second Editions, Disputes are referred in the first instance to a DAAB^[107] for a binding decision within 84 days. If no Notice of Dissatisfaction (NOD) is given within 28 days after receipt of the DAAB's decision, the decision becomes final and binding; if an NOD is given within the 28 day period, the Dispute is to be referred to amicable settlement.^[108] If no amicable settlement is reached within 28 days after the NOD, Disputes are to be submitted for final resolution by international arbitration.^[109]

CONCLUSION

The First Editions were successful and widely used in emerging markets around the globe. Their success can be attributed to their uniformity in style (subject to the differing procurement models) and ease of use. The provisions were also clearly drafted and easy to amend. Whilst the Second Editions adopt the same procurement models, they represent a different concept. They are extremely detailed and require rigorous contract administration. Parties will need to consider whether the approach in the Second Editions is appropriate for their project, or whether a simpler form adopting some of the 'updates' in the Second Editions would be more conducive to efficient and timely project delivery.

ABOUT THE FIRM'S CONSTRUCTION AND ENGINEERING PRACTICE

White & Case's construction and engineering group advises clients across the globe on all their construction-related needs, from the drafting of tender and project documentation to the resolution of disputes arising out of projects. We offer a single point of contact for project development, contract administration and dispute resolution advice, including dispute and risk mitigation.

Our experience with the FIDIC forms, the most widely used form of contract internationally, is particularly notable. We assist clients with contract management and in response to claims under the FIDIC form of contracts, DAB proceedings and arbitration proceedings arising out of the FIDIC form of contracts. We advised FIDIC on its updates to the FIDIC contracts in 2017.

In an acknowledgement of White & Case's FIDIC expertise, the firm was awarded the title 'Legal or Professional Services Firm of the Year' at the FIDIC International Users' Conference 2020 and 'Legal Services Firm of the Year' in 2023. FIDIC stated 'the judges were greatly impressed by the [Firm]', noting that White & Case has 'an impressive global track record, with significant work across the world'.

Our construction and engineering teams globally are regularly ranked in top tier of the leading legal directories, including Chambers and The Legal 500.

ENDNOTES

^[1] International Federation of Consulting Engineers.

^[2] The first set of amendments were introduced by FIDIC in December 2018 as errata. This was followed by a memorandum of additional errata in June 2019. Further amendments were identified by FIDIC through its subsequent review of the 2017 texts, and a third set of amendments were published by FIDIC in November 2022. See 'Amendments to the FIDIC Conditions of Contract For Building and Engineering Works Designed by The Employer', second edition (2017), www.fidic.org/sites/default/files/bean_files/2017%20FIDIC%20Red%20separated%20errata.pdf (accessed 10 July 2025); 'Amendments to the FIDIC Conditions of Contract for Plant and Design-Build for Electrical & Mechanical Plant, and for Building and Engineering Works, Designed by the Contractor' second edition (2017), www.fidic.org/sites/default/files/bean_files/2017%20FIDIC%20Yellow%20-%20separated%20errata.pdf (accessed 10 July 2025); 'Amendments to the FIDIC Conditions of Contract for EPC/Turnkey Projects' second edition (2017), www.fidic.org/sites/default/files/bean_files/2017%20FIDIC%20Silver%20-%20separated%20errata.pdf (accessed 10 July 2025).

^[3] 'Rainbow Suite ed.2017 reprinted 2022', FIDIC.

^[4] The FIDIC 2017 Contracts Guide , p. vi.

^[5] The Red Book was first published in 1957 as the 'Conditions of Contract (International) For Works of Civil Engineering Construction'.

^[6] First and Second Edition Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer (Red Book), Sub-Clause 12.3 and Sub-Clause 14.1.

^[7] Guidance for the Preparation of Particular Conditions, Second Edition Red Book, pp. 38–39.

^[8] Guidance for the Preparation of Particular Conditions, First Edition Red Book, pp. 12–13.

^[9] Second Edition Red Book and Second Edition Conditions of Contract for Plant and Design Build for Electrical and Mechanical Plant and for Building and Engineering Works designed by the Contractor (Yellow Book), Sub-Clause 3.1.

^[10] *ibid.*

^[11] In relation to which, see *Sutcliffe v. Thackrah* [1974] AC 727.

^[12] Second Edition Red and Yellow Books, Sub-Clause 3.2.

^[13] *id.*, Sub-Clause 14.6.1.(a).

^[14] *id.*, Sub-Clause 3.7.

^[15] Guidance for the Preparation of Particular Conditions, Second Edition Red and Yellow Books p. 21.

^[16] First Edition Red Book, Sub-Clause 3.1.

^[17] Christopher Seppälä, *The FIDIC Red Book Contract: An International Clause-by-Clause Commentary* (1st edn., Kluwer Law International, 2023), Chapter II, Section 4.4.1.

^[18] The Yellow Book was first published in 1963 as the 'Conditions of Contract For Electrical and Mechanical Works' and 'Export Contracts Including Delivery and Erection on Site'.

^[19] Second Edition Yellow Book, Sub-Clause 1.1.33; First Edition Yellow Book, Sub-Clause 1.1.1.5.

^[20] First and Second Edition Yellow Book, Sub-Clause 4.1.

^[21] First and Second Edition Yellow Book, Sub-Clause 14.3.

^[22] First and Second Edition Yellow Book, Sub-Clause 14.4.

^[23] First and Second Edition Yellow Book, Sub-Clause 14.5.

^[24] The FIDIC 2017 Contracts Guide, p. v.

^[25] Second Edition Silver Book, Sub-Clause 1.1.31; First Edition Silver Book, Sub-Clause 1.1.1.3.

^[26] First and Second Edition Silver Book, Sub-Clause 5.1.

^[27] Second Edition Silver Book, Sub-Clause 2.5 and Sub-Clause 4.10.

^[28] First and Second Edition Silver Book, Sub-Clause 4.12.

^[29] Second Edition Silver Book, Sub-Clause 3.1.

^[30] *ibid.*

^[31] *ibid.*

^[32] First Edition Silver Book, Sub-Clause 3.1.

^[33] Also the Red Book, to the extent the Contractor is required to design any part of the permanent works. See Second Edition Red Book, Sub-Clause 4.1(e).

^[34] Second Edition Yellow and Silver Books, Sub-Clause 4.1.

^[35] *ibid.*

- [36] *ibid.*
- [37] Also the Red Book, to the extent the Contractor is required to design any part of the permanent works. See Second Edition Red Book, Sub-Clause 4.1(e).
- [38] Second Edition Yellow and Silver Books, Sub-Clause 17.4.
- [39] Second Edition Red and Yellow Books, Sub-Clause 1.15; Second Edition Silver Book, Sub-Clause 1.14.
- [40] Second Edition Yellow and Silver Books, Sub-Clause 19.2.3(b).
- [41] First Edition Yellow and Silver Books, Sub-Clause 4.1.
- [42] Second Edition Yellow Book, Sub-Clause 1.1.63; Second Edition Silver Book, Sub-Clause 1.1.53.
- [43] Clause 9.4 of the Second Edition Yellow and Silver Books refers to Sub-Clause 11.4(b)(i).
- [44] The Contract Price will be reduced in circumstances where there is no Schedule of Performance Guarantees or where Performance Damages do not apply. See Sub-Clause 9.4(d) of the Second Edition Yellow and Silver Books, which refers to Sub-Clause 11.4(b)(ii).
- [45] Second Edition Yellow and Silver Books, Sub-Clause 12.4.
- [46] *ibid.*
- [47] See Sub-Clause 9.4 and Sub-Clause 11.4(b) of the Second Edition Red Book.
- [48] First Edition Yellow and Silver Books, Sub-Clause 9.4.
- [49] *id.*, Sub-Clause 12.4.
- [50] Second Edition Red and Yellow Books, Sub-Clause 1.1.27; Second Edition Silver Book, Sub-Clause 1.1.24.
- [51] First Edition Red, Yellow and Silver Books, Sub-Clause 1.1.3.7.
- [52] First Edition Red and Yellow Books, Appendix to Tender; First Edition Silver Book, Particular Conditions.
- [53] First Edition and Second Edition Red, Yellow and Silver Books, Sub-Clause 11.1.
- [54] *id.*, Sub-Clause 11.3.
- [55] *id.*, Sub-Clause 11.10.
- [56] *ibid.*
- [57] *id.*, Sub-Clause 8.2.
- [58] *id.*, Sub-Clause 8.1.
- [59] First Edition Red, Yellow and Silver Book, Sub-Clause 8.3, 'Programme'.
- [60] First and Second Edition Red, Yellow and Silver Books, Sub-Clause 8.3.
- [61] *ibid.*
- [62] The Employer in the Second Edition Silver Book.

- [63] Second Edition Red Book, Sub-Clause 1.1.66; Second Edition Yellow Book, Sub-Clause 1.1.67; Second Edition Silver Book, Sub-Clause 1.1.57.
- [64] Second Edition Red, Yellow and Silver Books, Sub-Clause 8.3.
- [65] To the level of detail stated in the Employer's Requirements (Yellow and Silver Books) and the Specification (Red Book).
- [66] Second Edition Red, Yellow and Silver Books, Sub-Clause 8.3(g).
- [67] *id.*, Sub-Clause 4.20(h).
- [68] First Edition Red, Yellow and Silver Books, Sub-Clause 8.3(d).
- [69] Second Edition Red, Yellow and Silver Books, Sub-Clause 8.3(k)(iii).
- [70] *id.*, Sub-Clause 8.8.
- [71] *ibid.*
- [72] *ibid.*
- [73] With the addition of 'tsunami' to 'natural catastrophes'. See Sub-Clause 18.1(f) of the Second Edition Red, Yellow and Silver Books.
- [74] Second Edition Red, Yellow and Silver Books, Sub-Clause 18.4.
- [75] *id.*, Sub-Clause 18.5.
- [76] *ibid.*
- [77] First Edition Red, Yellow and Silver Books, Sub-Clause 19.4.
- [78] 'Particular Conditions' in the First Edition Red, Yellow and Silver Books.
- [79] Second Edition Red and Yellow Books, Sub-Clause 1.15; Second Edition Silver Book, Sub-Clause 1.14; First Edition Red, Yellow and Silver Books, Sub-Clause 17.6.
- [80] *ibid.*
- [81] Second Edition Red and Yellow Books, Sub-Clause 1.15; Second Edition Silver Book, Sub-Clause 1.14.
- [82] First Edition Red, Yellow and Silver Books, Sub-Clause 17.6.
- [83] Second Edition Red and Yellow Books, Sub-Clause 3.7.3.
- [84] *id.*, Sub-Clause 3.7.2.
- [85] *id.*, Sub-Clause 3.7.3.
- [86] *id.*, Sub-Clause 3.7.2.
- [87] Second Edition Silver Book, Sub-Clause 3.5.2.
- [88] First Edition Red, Yellow and Silver Books, Sub-Clause 3.5.
- [89] Second Edition Red and Yellow Books, Sub-Clause 3.7.4.
- [90] Second Edition Red and Yellow Books, Sub-Clause 3.7.5; Silver Book, Sub-Clause 3.5.5.
- [91] First Edition Silver Book, Sub-Clause 3.5.

[92] *ibid.*

[93] Second Edition Red Book, Sub-Clause 1.1.6; Yellow Book, Sub-Clause 1.1.5; Second Edition Silver Book, Sub-Clause 1.1.3.

[94] Second Edition Red, Yellow and Silver Books, Sub-Clause 20.2.1. For the meaning of 'event or circumstance' see *Obrascon Huarte Lain SA v. Attorney General for Gibraltar* [2014] EWHC 1028 (TCC); *Panther Real Estate Development LLC v. Modern Executive Systems Contracting LLC* [2022] DIFC CA 016.

[95] Second Edition Red, Yellow and Silver Books, Sub-Clause 20.2.1.

[96] Second Edition Red, Yellow and Silver Books, Sub-Clause 20.2.4.

[97] Eighty-four days for the provision of the fully detailed Claim: 42 days for the agreement and 42 days for the determination of the Claim.

[98] First Edition Red, Yellow and Silver Books, Sub-Clause 20.1.

[99] *id.*, Sub-Clause 2.5. See also *NH International (Caribbean) v. National Insurance Property Development Company* [2015] UKPC 37.

[100] First Edition Red, Yellow and Silver Books, Sub-Clause 20.1.

[101] Second Edition Red, Yellow and Silver Books, Sub-Clause 15.4. The provision also states that Delay Damages are payable between the Time for Completion and the date of termination.

[102] Second Edition Red, Yellow and Silver Books, Sub-Clause 11.4(d).

[103] *id.*, Sub-Clause 9.4(b).

[104] *id.*, Sub-Clause 18.5.

[105] For the Employer's termination for default, see Sub-Clause 15.4, Sub-Clause 11.4(c) and Sub-Clause 9.4(b) of the First Edition Red, Yellow and Silver Books. For the Contractor's termination for default, see Sub-Clause 16.4 and Sub-Clause 19.6 of the First Edition Red, Yellow and Silver Books.

[106] See definition of 'Dispute' in Sub-Clause 1.1.29 of the Second Edition Red and Yellow Books and Sub-Clause 1.1.26 of the Second Edition Silver Book.

[107] Referred to as the 'Dispute Adjudication Board' in the First Editions.

[108] Second Edition Red, Yellow and Silver Books, Sub-Clause 21.5.

[109] *id.*, Clause 21.

WHITE & CASE

Ellis Baker
Rebecca Major

ebaker@whitecase.com
rebecca.major@whitecase.com

<https://www.whitecase.com/>

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