

Alert 24 February 2023 | 10 min read

Important Changes to FIDIC's Rainbow Suite

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In international construction contracts, few legal matters are more important than the definitions of "Claim" and "Dispute" or the procedure for the "Dispute Avoidance/Adjudication Board ("DAAB")". These are all the subject of amendments to FIDIC's Red, Yellow and Silver Books (the "Rainbow Suite"), 2017, contained in the 2022 Reprints of those forms of contract ("2022 Reprints") issued in November 2022. While the 2022 Reprints incorporate numerous other, for the most part, minor changes, it is the amendments involving these topics which are the focus of this report. They clarify and significantly improve the Rainbow Suite.

Key 2022 Changes to the Rainbow Suite

This Client Alert will address the following changes to the Rainbow Suite: (i) identification of "matter[s] to be agreed or determined" and their differentiation from Claim(s); (ii) a new definition of "Dispute" as well as the introduction of the concept of a "deemed Dispute"; and (iii) changes to the DAAB procedure.

1. Identification of "matter[s] to be agreed or determined"

With the release of its 2017 Rainbow Suite, FIDIC introduced the concept of "matter" or "matter[s] to be agreed [by the Parties] or determined [by the Engineer]."¹ Albeit not specifically defined in those forms, "matter[s] to be agreed or determined" was evidently intended to cover certain events or circumstances requiring administrative action by the Engineer (or, in the case of the Silver Book, the Employer's Representative) of some kind, as it was in this context that the concept was used.² It was referred to separately from a "Claim."³

In contrast to a "Claim", a "matter" did not require a Party to comply with the relatively burdensome Claims procedure.⁴ Consequently, when dealing with "matter[s]" under the 2017 forms, a Contractor was relieved from having to comply with, for example, the 28-day time limit applicable to Notices of Claim and the obligation to maintain contemporary records.⁵

The 2017 standard forms, however, did not set out what constitutes a "matter to be agreed or determined" and how exactly to distinguish it from a "Claim." The 2022 Reprints clarify this by (i) identifying what falls under "matter[s] to be agreed or determined"⁶ and (ii) expressly excluding "matter[s] to be agreed or determined" from the definition of "Claim."⁷

With the addition of new wording in the 2022 Reprints,⁸ FIDIC users are now clearly informed of the events and circumstances to which the term "matter[s] to be agreed or determined" applies.⁹ These include, for instance: (i) whether, during the Defects Notification Period, work required to remedy defects or damage is attributable to a cause for which the Contractor is responsible;¹⁰ (ii) disagreement of the Contractor and Engineer about the measurement of works on Site or from records (only for the Red Book);¹¹ as well as (iii) following the termination of a contract for the Contractor's default, valuation of the Permanent Works executed and any other amounts due to the Contractor.¹²

2. New definition of Dispute and concept of "deemed Dispute"

The 2017 Rainbow Suite defined a "Dispute" as arising where a Party made a claim against the other Party which was rejected by the other Party or the Engineer/Employer's Representative, and to which rejection the first Party did not acquiesce (by giving a Notice of Dissatisfaction ("NOD") under Sub-Clause 3.7.5 or otherwise).¹³

The 2022 Reprints introduce three amendments to this definition of "Dispute".¹⁴

First, as a result of both the amended definition of "Claim" and the new definition of "matter[s] to be agreed or determined", reference in the definition of "Dispute" to "claim" (with a small "c") is replaced under the 2022 Reprints with "Claim" or "matter to be agreed or determined".¹⁵

Second, and of most importance, the new definition of "Dispute" is more onerous than in the 2017 forms, as it requires a Party to give a NOD with respect to an Engineer/Employer's Representative's determination which was not necessarily required by the original definition.¹⁶ Thus, a Party with a Claim can no longer sidestep the Engineer/Employer's Representative in its agreement and determination role and refer a Dispute directly to the DAAB, as a Party could do under the 2017 forms.¹⁷ Instead, it must first proceed under the Claims procedure¹⁸ and only after it has done so and after it (or the other Party) has given a NOD, transforming the Claim into a Dispute, may a Party refer the Dispute to the DAAB and later, if necessary, to arbitration.

Third, a Dispute is also "deemed to have arisen" in three specific circumstances: (i) under Sub-Clause 16.2.1, when the Engineer/Employer's Representative has failed to certify a Statement of the Contractor, or the Employer has failed to pay a Payment Certificate of the Engineer/Employer's Representative; (ii) under Sub-Clause 14.8, the Employer has failed to pay financing charges that were due to the Contractor; and (iii) under Sub-Clauses 15.2.2, 16.2.2, 18.5 or 18.6, the Parties are in disagreement about a Party's entitlement to give either a Notice of intention to terminate the contract or a Notice of termination of the contract.¹⁹ In these three scenarios, a Party is authorised, under the 2022 Reprints, to refer the Dispute directly to the DAAB without the need to comply with the Claims procedure²⁰ or to refer the Dispute to the DAAB within 42 days of giving or receiving a NOD.²¹

3. Changes to the DAAB procedure

The 2017 Rainbow Suite gave the DAAB a central role in the dispute avoidance and resolution process. The 2022 Reprints maintain this role while amending the DAAB's appointment procedure and DAAB practice to take account of work tendencies post-COVID-19.

Under the 2022 Reprints, if the Parties fail to agree on the appointment or replacement of a DAAB member(s) or on the DAAB agreement itself,²² either Party may request the President of FIDIC, as the appointing official under the contract, and after due consultation with both Parties and the prospective DAAB member(s), to appoint the member(s) or replacement and set the terms of the appointment,²³ including the monthly and daily fee for each member or replacement. The President's selection of the DAAB member(s) is not limited to those persons listed in the Contract Data or previously agreed by the Parties.

To reflect work trends and concerns in this post-pandemic era, the 2022 Reprints allow the DAAB's meetings to be held virtually, as an alternative to in-person.²⁴ The latest forms further eliminate the need for face-to-face meetings or in-person Site visits where, in exceptional circumstances, it would be prudent to hold them online.²⁵

Conclusion

The 2022 Reprints of FIDIC's Rainbow Suite provide welcome clarifications to the meanings of "matter[s] to be agreed or determined," "Claim" and "Dispute."

By specifying the sub-clauses to which the notion of "matter[s] to be agreed or determined" refers for purposes of each form and excluding it from the definition of "Claim", the 2022 Reprints eliminate a major uncertainty under the 2017 forms.

The new definition of Dispute, by requiring the giving of a NOD with respect to an Engineer/Employer's Representative's determination, reinforces the role of the Engineer/Employer's Representative in resolving Claims and "matter[s]" between the Parties. Parties can no longer sidestep the Engineer/Employer's Representative in its agreement and determination role.

The 2022 Reprints acknowledge and give effect to work cultures in a post-COVID world, by frequently providing for the possibility of holding meetings online.

In light of the importance of these and other amendments, parties to construction projects should use the 2022 Reprints of the Red, Yellow and Silver Books in place of the 2017 versions.

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Please contact the authors of this Client Alert or Partner Christophe von Krause should you have any questions.

1 Sub-Clause 3.7 of the 2017 Red and Yellow Books; Sub-Clause 3.5 of the 2017 Silver Book, under which the determination was made instead by the Employer's Representative.

2 Ibid.

3 Ibid. A "Claim" was 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 of the 2017 Red Book; Sub-Clause 1.1.5 of the 2017 Yellow Book and Sub-Clause 1.1.3 of the 2017 Silver Book).

4 Clause 20 of the Red, Yellow and Silver Books; Sub-Clause 3.7 of the Red and Yellow Books and 3.5 of the Silver Book.

5 Sub-Clauses 20.2.1 and 20.2.3 of the 2017 Red, Yellow and Silver Books.

6 Sub-Clause 3.7(a) of the 2022 Reprints of the Red and Yellow Books; Sub-Clause 3.5(a) of the 2022 Reprint of the Silver Book.

7 The new definition of a "Claim" in the 2022 Reprints of the 2017 Red and Yellow Books now reads: "'Claim" means a request or assertion by one Party to the other Party (excluding a matter to be agreed or determined under sub-paragraph (a) of Sub-Clause 3.7 [Agreement or Determination]) 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 of the 2022 Reprint of the Red Book; Sub-Clause 1.1.5 of the 2022 Reprint of the Yellow Book). Sub-Clause 1.1.3 of the 2022 Reprint of the Silver Book is similar.

8 Sub-Clause 3.7(a) of the 2022 Reprints of the Red and Yellow; Sub-Clause 3.5(a) of the 2022 Reprint of the Silver Book.

9 Sub-Clause 3.7(a) of the 2022 Reprints of the Red and Yellow Silver state that "[w]henver these Conditions provide that the Engineer shall proceed under this Sub-Clause 3.7 to agree or determine either: (a) any matter, as provided for in Sub-Clauses 4.7.3, 10.2, 11.2, 12.1, 12.3, 13.3.1, 13.5, 14.4, 14.5, 14.6.3, 15.3, 15.6 and 18.5, identifying in the same Sub-Clause the date of commencement of the corresponding time limit for agreement under Sub-Clause 3.7.3 [Time limits]; or (b) any Claim, the following procedure shall apply: " See also Sub-Clause 3.5(a) of the 2022 Reprint of the Silver Book.

10 Sub-Clause 11.2 of the 2022 Reprints of the Red, Yellow and Silver Books.

11 Sub-Clause 12.1 of the 2022 Reprint of the Red Book.

12 Sub-Clause 15.3 of the 2022 Reprints of the Red, Yellow and Silver Books.

13 Sub-Clause 1.1.29 of the 2017 Red and Yellow Books; Sub-Clause 1.1.26 of the 2017 Silver Book.

14 Sub-Clause 1.1.29 of the 2022 Reprints of the Red and Yellow Books state that: "'Dispute" means any situation where: (a) one Party has made a Claim, or there has been a matter to be agreed or determined under sub-paragraph (a) of Sub-Clause 3.7 [Agreement or Determination]; (b) the Engineer's determination under Sub-Clause 3.7.2 [Engineer's Determination] was a rejection (in whole or in part) of: (i) the Claim (or there was a deemed rejection under sub-paragraph (i) of Sub-Clause 3.7.3 [Time limits]); or (ii) a Party's assertion[s] in respect of the matter as the case may be; and (c) either Party has given a NOD under Sub-Clause 3.7.5 [Dissatisfaction with Engineer's determination]." See also Sub-Clause 1.1.26 of the 2022 Reprint of the Silver Book.

15 As the latter term is defined at Sub-Clause 3.7(a) of the 2022 Reprints of the Red and Yellow Books; Sub-Clause 3.5(a) of the 2022 Reprint of the Silver Book.

16 Sub-Clause 1.1.29 of the 2022 Reprints of the Red and Yellow Books; Sub-Clause 1.1.26 of the 2022 Reprint of the Silver Book.

17 Ibid.

18 Clause 20 of the 2022 Reprints of the Red, Yellow and Silver Books; Sub-Clause 3.7 of the 2022 Reprints of the Red and

Yellow Books and Sub-Clause 3.5 of the 2022 Reprint of the Silver Book.

19 Note that in the case of "matter[s] to be agreed or determined", a Dispute is also deemed to arise if the Engineer/Employer's Representative does not give a NOD within the relevant time limit (Sub-Clause 3.7.3, para. 2 (ii) of the 2022 Reprints of the Red and Yellow Books; Sub-Clause 3.5.3, para. 2 (ii) of the 2022 Reprint of the Silver Book).

20 As provided at Clause 20 of the 2022 Reprints of the Red, Yellow and Silver Books; Sub-Clause 3.7 of the 2022 Reprints of the Red and Yellow Books and Sub-Clause 3.5 of the 2022 Reprint of the Silver Book.

21 As would normally be required by Sub-Clause 21.4.1(a) of the 2017 and 2022 Reprints of the Red and Yellow Books.

22 Unless otherwise agreed by the Parties.

23 Sub-Clause 21.2 of the 2022 Reprints of the Red, Yellow and Silver Books.

24 DAAB Procedural Rules 2.1, 3.2 and 3.4 of the 2022 Reprints of the Red, Yellow and Silver Books.

25 DAAB Procedural Rule 3.3 of the 2022 Reprints of the Red, Yellow and Silver Books.

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