

The Enhanced Claims Provisions of the 2017 FIDIC Contracts ¹

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Introduction

In December 2017, the long-awaited updates of the 1999 editions of the FIDIC Red, Yellow and Silver books were launched with much fanfare. Regular users of the 1999 editions may perhaps have been expecting a leaner and more user-friendly version of the contracts; if so, they were to be disappointed.

One of the principal intents of the drafters of the updated forms is to provide users with clarity, transparency and certainty, so as to reduce the risk of disagreements regarding the interpretation of terms. The achievement of this intent has resulted in the updated forms containing at least 50 per cent more words and the introduction of significantly more prescriptive, complex, and particularly for the non-native English user, often difficult to understand provisions.

This review of the enhanced claims provisions of the updated contracts identifies potential areas of concern and how easily deficient application of terms could quickly lead to disagreement, dispute and delayed recovery of, or loss of, entitlement.

The review is based on the FIDIC Red Book, Conditions of Contract for Construction, 2017 Edition.

Structural changes

The first obvious change from the 1999 books is that two main clauses now exist in place of one, with cl.20 of the 2017 books dealing only with claims, and a new cl.21 dealing with disputes and arbitration. The reason for this division into two clauses, apparently, is to more obviously convey the message that claims do not (necessarily) have to become disputes before they can be resolved. Whether this subtle change will in fact influence or cause contracting parties to act differently to the way they currently deal with claims administration under the FIDIC forms remains to be seen.

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The second obvious change is that cl.20 is now titled “Employer’s and Contractor’s Claims”. This means that a single and same procedure is to apply to both Contractor and Employer claims. For an Employer, this might come as a real shock: no longer can notice and particulars of claim be submitted “as soon as practicable after the Employer [factually] became aware of the event”, and with no sanction of time-bar. Subclause 2.5 Employer’s Claims of the 1999 edition is no more. Instead, under the 2017 forms, an Employer must satisfy exactly the same tests and criteria as a Contractor must satisfy: notice is to be given “as soon as practicable, and no later than 28 days after the claiming Party became aware, or should have become aware, of the event”, with any failure to do so risking the sanction of time-bar. But more on this later.

The third obvious change from the 1999 forms is the significant increase in the length of the claim and dispute provisions, from a total of 4.5 pages in the 1999 forms to more than 10.5 pages in the 2017 versions. If you then throw in the enhancements made to subcl.3.5 (Determinations) of the 1999 editions—an essential component of the claims administration process—which increases the length of the provision from two paragraphs or 0.2 of a page into a procedure (subcl.3.7—Agreement or Determination) of some three pages and numerous paragraphs, means that the poor claims administrator will in future have to give regard to some 13.5 pages of detailed provisions and procedures, as opposed to less than five under the previous edition.

The cause of this huge expansion of provisions is the deliberate elevation by FIDIC of the claim administration process into a very formalised, detailed and prescriptive set of rules and procedures. The thinking goes that greater prescription gives absolute clarity on requirements, the steps to be taken and the timescales to be met, which will result in claims being dealt with and resolved efficiently and without delay. But in reality, this greater level of prescription, detail and complexity will simply increase the likelihood of disputes occurring if required steps or timescales are not fully understood or taken correctly, in time, or at all.

The fourth obvious impact of the enhanced provisions will be the increased demands placed on the contract and claims management teams of each of the Employer, Contractor and the Engineer/Employer’s Representative. The detailed procedural steps and requirements will necessitate the upscaling and upskilling of project control teams, meaning the probable necessary engagement of additional, experienced and specialist resources, all at further cost to the parties, if the key players to construction contracts are to have any hope of effectively and fully implementing the enhanced requirements of the 2017 FIDIC contracts.

New defined terms

The 2017 FIDIC conditions introduce a number of new defined terms, including those for “Claim”, “Dispute” and “Notice”. Whilst seeking to bring certainty of meaning to these terms, it is not difficult to see how a user (and in particular a non-native English user) may innocently misconstrue, for example, the distinction between Claim (with a capital “C” and therefore a defined term) and claim (with a small “c” and meaning something else). As an example, the definition of “Dispute” makes reference to both a “claim” as well as a “Claim”, then further

complicating matters in stating that a “claim” could be a “Claim” under certain circumstances.

The level of contract awareness and administration required under the 2017 forms may be understood by considering the defined term Notice. Subclause 1.3 has been expanded and requires that to be valid, a Notice must be:

- 1) a paper or electronic original signed by the authorised representation of the Employer, Contractor, or Engineer, as the case may be;
- 2) formally identified as a Notice;
- 3) delivered by hand (against receipt) transmitted in a manner stated in the Contract; and
- 4) delivered, sent or transmitted to the address of the recipient stated in the Contract.

Given the formal requirements that have to be satisfied to become a valid Notice, it is not difficult to see that challenges and disputes could easily arise as to whether such formalities have been satisfied or not. Moreover, as the 2017 conditions contain nearly 350 separate references to Notice, contracting parties and the Engineer will be faced with the constant challenge of ensuring that required Notices are not only issued in time, but in each case satisfy the stated criteria to be recognised as a valid Notice.

Why is this a concern? Because getting it wrong could lead to disputes, delayed or loss of entitlement, and significant financial losses.

Clause 20—employer’s and contractor’s claims

Clause 20 is a long and complex provision. It opens by stating that Claims (with a capital “C”) can arise in one of three ways, the first two of which are uncontroversial: Employer’s claims, previously falling under subcl.2.5 of the 1999 editions of the contract; and Contractor’s claims for extension of time and/or additional payment. More on these two types of claim later.

But it is the third type of Claim that will likely cause confusion as this relates to “another entitlement or relief ... of any kind whatsoever”. The examples listed in the provision of the kinds of entitlements or relief envisaged suggest the entitlement or relief will stem from a disagreement between the parties on a certificate, instruction, determination and so on. This is confirmed by the clause stating that such Claims shall be deemed not to give rise to a Dispute for referral to the dispute avoidance and adjudication board (“DAAB”) but shall instead, and subject to timely issue of Notice, be referred to the Engineer, and the new subcl.3.7 (Agreement or Determination) will apply.

The consequence of this provision appears to be that no disagreement can be referred to the DAAB unless and until a subcl.3.7 determination has been issued. But why is this further intermediate step necessary? Not only does it delay the crystallisation and escalation of a Dispute to the DAAB, it creates the situation where the Engineer may be obliged to issue a subcl.3.7 determination in respect of a disagreement concerning an already taken position of the Engineer, or in relation to a determination that the Engineer was required to make but didn’t. Where is the sense in that?

As noted above, the FIDIC 2017 claims procedure applies equally to Employer's Claims as it does for Contractor's Claims. It will be interesting to see whether Employer users of the new forms will make amendments to the notice provisions of cl.20 in order to exempt themselves from the risk of loss of entitlement due to issue of late notice, given that this could mean, for example, the complete loss of right to deduct delay damages in the event of late completion by the Contractor if the required Notice of Claim is issued out of time or not in the correct form.

Under the 2017 editions, there are four essential steps to the Claims process:

- 1) Notice of Claim;
- 2) Engineer's Initial Response;
- 3) Fully Detailed Claim; and
- 4) Agreement or Determination of the Claim.

Notice of claim

Very little has changed with respect to the notice provisions of cl.20 other than the formalisation of the meaning of "Notice", and the provision applying equally to Employer Claims and Contractor Claims. Notice of Claim is to be issued within 28 days of a party becoming aware (or ought to have become aware) of an event or circumstance giving rise to the claim, otherwise that party faces loss of entitlement as a consequence of time-barring.

Engineer's initial response

This is a new step to the 1999 FIDIC Claim process and one likely to give the Engineer a few headaches. Essentially, if the Engineer considers a party has not issued a Notice of Claim within the required 28 days period, the Engineer is to issue a Notice to that effect (with reasons) within 14 days of receiving the Notice of Claim.

Whether the Engineer issues Notice within 14 days or not, an aggrieved party has the right to issue its own Notice to the Engineer (at any time up to issue of the fully detailed claim it appears) to register disagreement with the Engineer's action, or non-action, as the case may be. The Engineer therefore faces the classic "damned if you do, damned if you don't" scenario.

One may have thought that in the event a party raises challenge with the action or non-action of the Engineer as to whether a Notice of Claim is valid or not (in other words, whether the time-bar sanction is to bite or not) the most sensible and practical step to then take would be to immediately refer that disagreement to the DAAB for decision. Depending on the DAAB's decision, the notified Claim would then either proceed or fall. But no, not under the 2017 FIDIC conditions. Instead, the parties are required to proceed through the remaining steps of the Claim process, potentially at much time and expense, before the issue of time-bar falls to be considered as part of the subcl.3.7 agreement or determination process. Again, what purpose does this delay in having a seminal issue of principle of entitlement decided serve? It is hard to say.

But for the Engineer, there is a potential further challenge to face. Under subcl.3.7 (Agreement or Determination) (and assuming the parties have not agreed) the Engineer is obliged to review and determine whether the Engineer's initial decision

to issue or not a Notice to the original Notice of Claim was correct. In this respect, subcl.20.2.5 provides that the Engineer is entitled to consider any evidence of the other party's prior knowledge of the event or circumstance giving rise to the Claim, and whether and to what extent the other party might be prejudiced, when reviewing the initial decision to give a Notice. Will any Engineer be brave enough to overturn an initial decision to issue a Notice that effectively declares a claim time-barred and face an upset Employer, or will the Engineer simply endorse the initial decision come what may, thereby increasing the likelihood of a formal Dispute for referral to the DAAB?

Consider also what consequences might result if the Engineer does not issue a Notice to a Notice of Claim, thereby allowing the Claim to proceed on the basis of being valid, only for the other party to raise challenge by Notice, and then the Engineer determines under subcl.3.7 (Agreement or Determination) that a Notice should have been given, and the Claim is therefore rejected as invalid.

Perhaps the answer to this problem is for the Engineer, when considering the initial response, to proactively and rigorously examine whether and to what extent the other party had any prior knowledge of the event or circumstance described in the Notice of Claim, before coming to the decision whether to issue a Notice or not. It remains to be seen whether any prior knowledge of the Engineer of the event or circumstance would be relevant to this question, where the "other party" is the Employer, or whether the relevant test is the Employer's own prior knowledge, regardless of that of the Engineer.

Fully detailed claim

A change from the 1999 FIDIC forms is for a "fully detailed Claim" (previously "detailed particulars of claim") to be submitted within 84 days (rather than the previous 42 days) from the date of the event or circumstance giving rise to the Claim. The new subcl.20.2.4 provides that a fully detailed Claim shall include:

- 1) a detailed description of the event or circumstance giving rise to the Claim;
- 2) a statement of the contractual and/or legal basis of the Claim;
- 3) all contemporary records relied on; and
- 4) detailed supporting particulars of the extension of time and/or additional payment being claimed.

Nothing too revolutionary here. However, users of the new 2017 FIDIC forms be aware, as a new time-barring provision has been introduced. If the claiming party does not provide a statement of the contractual and/or legal basis of the claim within the time stated, the original Notice of Claim will be "deemed" to have lapsed and no longer be considered valid. In such instance, the Engineer is to issue Notice to the claiming party to that effect within 14 days after the time limit for submission of the statement has expired. This provision appears problematic since it declares on the one hand that a Notice of Claim will be "deemed" to have lapsed and no longer be considered valid on the basis of factual non-compliance with the stated time-frame, whereas on the other hand such deeming provision appears only to bite subject to issue by the Engineer of a Notice within 14 days.

This confusion is confirmed by the next paragraph of the subclause which states that if the Engineer does not give the requisite Notice within 14 days, the original Notice of Claim is once again “deemed to be a valid Notice”. In other words, an apparently valid Notice can become “deemed invalid” due to late or non-issue of the statement of basis of entitlement, only for that very same Notice to once again become valid if the Engineer does not issue his own Notice in time or at all! Confused?

Consider now the following scenario.

- 1) An original Notice of Claim is made subject to a Notice from the Engineer stating that the Notice of Claim was issued late. In other words, the sanction of time-bar may apply. Whether or not such sanction applies is subject to the Engineer’s later determination as to whether the original Notice of Claim is to be treated as valid or not under subcl.3.7 (Agreement or Determination).
- 2) Regardless of the above, the claiming party proceeds to issue a statement of the contractual and/or legal basis of the Claim but not within the stated time-period. As a result, the original Notice of Claim is deemed to have lapsed and is no longer considered valid. However, because the Engineer does not issue a Notice to that effect within the required period of 14 days, the original Notice of Claim is once again deemed to be a valid Notice.

In other words, we have the situation where the original Notice of Claim may subsequently be determined to be invalid by the Engineer under 1), but that same Notice of Claim during the process prior to a determination being made is deemed to be a valid Notice of Claim under 2). Construction lawyers may no doubt be looking forward to testing the status of the Notice of Claim in such circumstance.

Like for the Engineer’s initial response to a Notice of Claim, an aggrieved party may issue a Notice raising challenge with the Engineer’s decision to issue a Notice or not with respect to the statement setting out the contractual and/or legal basis of the Claim. The outcome of such challenge will again be made during the subcl.3.7 agreement or determination stage of the Claim process.

The final paragraph of subcl.20.2.4 is short and states that if a Claim has continuing effect, subcl.20.2.6 (Claims of Continuing Effect) will apply. For a claim of continuing effect, the Engineer is expressly required to give a response on the contractual and/or legal basis of the Claim by giving a Notice to the claiming party within a specified timeframe.

However, it is unclear whether the Engineer has that same duty to respond where a Claim is not of continuing effect (in other words, a final Claim). This is because subcl. 20.2.5 (Agreement or determination of the Claim) at the outset states that “after receiving a fully detailed Claim ... the Engineer shall proceed under Sub-Clause 3.7 [Agreement or Determination] to agree or determine [entitlement]”. As will be discussed below, under this provision the Engineer’s duty is to consult with the parties to endeavour to achieve agreement or otherwise determine the Claim; there is no duty for the Engineer to assess or respond to the Claim on the Employer’s behalf prior to such consultation or determination taking place. In other words, the consultation and determination process can start without the

Contractor (or the Employer, as the case may be) having had any response to its Claim from the other party or Engineer.

The final paragraph of subcl.20.3.5 does however state that if the Engineer requires “necessary additional particulars” in respect of a final Claim, “he/she shall nevertheless give his/her response on the contractual or other legal basis of the Claim, by giving a Notice to the claiming Party, within the time limit for agreement under Sub-Clause 3.7.3 [Time Limits]”. The Engineer is then to proceed under subcl.3.7 (Agreement or Determination) upon receipt of the requested further information, which date of receipt then becomes the date of commencement of the time limit for agreement. It thus appears the Engineer is only required to give a response to the Claim (and then only on its contractual or legal basis) if further particulars are requested; if no further particulars are requested, subcl.3.7 immediately applies.

Such uncertainty, in such a seminal part of the claims process, is unfortunate.

Agreement or determination of the claim

Subclause 20.2.5 states that after receiving a fully detailed Claim, the Engineer shall proceed under subcl.3.7 (Agreement or Determination) to agree or determine that Claim. This means first consulting with and encouraging the parties to reach mutual agreement, but if that fails proceeding to determine that Claim. But on what basis are the parties to consult if the claiming party has not received a response to a Claim, as suggested as is possible above given the formal requirements that have to be satisfied to become a valid Notice, it is not difficult to see that challenges and disputes could easily arise as to whether such formalities have been satisfied or not in order to defeat or delay the making of a Claim by a party? One can only presume that the other party must directly respond to the Claim, absent any stated requirement for the Engineer to do so. But if this is the case, how long should that other party have to respond? Clearly not long since subcl.3.7.3 (Time Limits) states that the Engineer is required to give a Notice of Agreement within 42 days of receipt of the claiming party’s fully detailed Claim.

Other potential concerns can be identified. For example, if the other party is the Employer, will the Employer have the expertise or staff to be able to properly consider and respond to a Claim from the Contractor? Will the Employer be entitled to have the Engineer respond to a Claim on the Employer’s behalf? If the Engineer is permitted to respond, does this compromise the Engineer’s obligation under subcl.3.7 (Agreement or Determination) to act neutrally between the parties and not be deemed to act for the Employer? Again, questions that might well find their answers in DAAB decisions, arbitral awards or case law in years to come.

If no agreement results from the consultation process, and subject to the Engineer issuing a Notice to that effect, the Engineer is required to proceed to determine the Claim. In making a determination the Engineer is required to make a fair determination in accordance with the Contract taking due regard of all relevant circumstances. As noted above, any challenge made with respect to the validity of the original Notice of Claim under cl.20 falls to be considered within the determination process. The Engineer has 42 days in which to render the determination from the date when the Notice of no agreement was issued.

However, if the Engineer does not issue a determination within the stated 42 days period (or such other period as may have been agreed), then the Claim the subject of the determination shall be “deemed rejected”. This again has potential ramifications in terms of a claiming party having spent much time, effort and expenditure in making a Claim under the Contract only for such Claim to be deemed to be rejected by the Engineer not issuing a determination within the stated time-frame or at all. Indeed, it is not difficult to envisage a situation whereby a Claim becomes deemed rejected, even though the claiming party may not have received any response to its Claim whatsoever!

“A review of the prescribed Claims process reveals a litany of complexity, confusion and uncertainty. The uncertainties that exist in the Claims provisions will provide every opportunity for a recalcitrant party to hinder and delay the resolution of Claims.”

In the event a Claim becomes “deemed rejected”, the third category of Claim under cl.20 appears to be engaged, meaning that, subject to the giving of a further Notice, the Engineer is to proceed to agree or determine the issue of the deemed rejection of the Claim, a somewhat self-defeating and potentially endless procedural step. Given the distinction in subcl.3.7.3 between the non-determination of a Claim (“deemed to be rejected”) and non-determination of a “matter to be agreed or determined” (which results in a Dispute that may be referred to the DAAB for decision), it is unclear when and if a Dispute with respect to the deemed rejection of a Claim properly forms under the Contract. Again, it is not difficult to foresee the situation of a recalcitrant Employer pressuring an Engineer to not determine a Claim within time or at all simply to cause the Claim to be deemed rejected, thereby placing the Contractor in the invidious position of not knowing whether the Claim has merit or not, or indeed what the next steps might be to pursue the Claim further.

Summary

Given that one of the principal intentions of the drafting panel for the FIDIC 2017 conditions was to bring clarity and certainty to contracting parties as to procedural steps and requirements, a review of the prescribed Claims process reveals a litany of complexity, confusion and uncertainty. The issue of a commentary or guidance notes on the new conditions of contract by FIDIC is considered essential and overdue.

For any parties embarking on projects using a FIDIC 2017 form of contract as its base, tremendous challenges lie ahead. Not only will many of the new and revised clauses come under critical attention and debate, additional and experienced claim and dispute practitioners will likely need to be engaged by each of the Employer, the Contractor and the Engineer, if all of the detailed and complex procedural steps and requirements are to be satisfied.

Even then, unfortunately, the reality of the situation is that the changes brought about in the 2017 FIDIC contracts will likely present immense challenges and result in often innocent breaches of contract requirements (for example, deficiency in the formality of a Notice under the Contract) that may well result in more Disputes (rather than less). Of course, cooperative and willing parties may be able

to amicably chart their way through the new conditions and apply common sense in order to resolve doubts and uncertainties fairly and equitably. But on the other hand, the uncertainties that exist in the Claims provisions will provide every opportunity for a recalcitrant party to hinder and delay the resolution of Claims, which goes against the core stated intent and desire of the FIDIC drafters.