Fidic’s Red Book 1999 edition: a study review

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The paper describes the main features of the 1999 edition of Fidic’s Red Book, possibly the most commonly used standard-form construction contract in international projects. The paper is addressed to construction professionals who already have an understanding of English construction contracts but have not yet looked into Fidic contracts. The 1999 Red Book is for use when the contractor has been given the design by the employer. The contract features general and particular conditions, the latter of which have to be drafted by the parties before the contract is entered into. A typical feature of the 1999 Red Book is the role of the engineer. Whether he has to act for the employer or whether he has to make a fair determination depends on the matter in question. There are two striking differences from the contract JCT SBC 2005 regarding claims of the contractor. First, only the 1999 Red Book contains strict time bars. Second, the clauses which contain events that justify claims are spread out over the whole contract and not contained in comprehensive lists of events. New features are clause 13.2 on value engineering and clause 20 on the impartial dispute adjudication board.

1. INTRODUCTION: THE STUDY GROUP
This is a report on the findings of the study group on international construction law at the school of construction management and engineering, University of Reading. The study group was set up in 2008 to bring together people with an interest in international construction law. The group studied the clauses of the Fidic 1999 Red Book (Fidic, 1999a) and their practical implications, and compared the contract with others. The report is an introduction to the main features of the 1999 Red Book for construction professionals who already have an understanding of English construction contracts but have not yet looked into Fidic contracts. Different topics were examined by pinpointing the relevant clauses in the 1999 Red Book.

2. FIDIC AND ITS SUITE OF CONTRACTS
The acronym Fidic stands for the French name of the International Federation of Consulting Engineers: Fédération Internationale des Ingénieurs-Conseils. This organisation has its headquarters in Geneva, Switzerland. Its members are national associations of consulting engineers. Fidic is best known for publishing a suite of contracts for international engineering projects. The last major update of this suite stems from 1999. Corbett (2002) referred to the standard forms which were published in 1999 as ‘Fidic’s rainbow’ because Fidic refers to them under different colours.

(a) Red Book 1999: Conditions of Contract for Construction, 1st edn (Fidic, 1999a).
(b) Yellow Book 1999: Conditions of Contract for Plant and Design-Build, 1st edn (Fidic, 1999b).
(c) Silver Book 1999: Conditions of Contract for EPC/Turnkey Projects, 1st edn (Fidic, 1999c).
(d) Green Book 1999: Short Form of Contract, 1st edn (Fidic, 1999d).

Since 1999 Fidic has published the following other contracts.

(a) Model Representative Agreement, test edn, 2004 (Fidic, 2004).
(c) Harmonised Red Book 2006: Conditions of Contract for Construction (Multilateral Development Bank Harmonised), 1st edn (Fidic, 2006b).

The main contracts of 1999 all contain 20 clauses and 17 of these clauses have common clause titles (Corbett, 2002: p. 1). Fidic contracts have been translated into about 15 languages which indicates their widespread relevance and use. No other standard-form construction contract has been translated into so many languages.

3. FIDIC’S RED BOOK 1999
The 1999 Red Book is the flagship of all Fidic contracts. Like the other contracts, it is recommended for use ‘where tenders are invited on an international basis’ (Foreword to the contract). Although the contract is officially called the Conditions of Contract for Construction and Fidic refers to it as the ‘Construction Contract’, it is popularly better known as the ‘new Red Book’ or the ‘1999 Red Book’. The contract should not be called the ‘Red Book’ because that name is associated with Fidic’s Conditions of Contract for Works of Civil Engineering Construction, 4th edition of 1987.
(Fidic, 1987). Even though the 1987 contract was not supplemented by the 1999 Red Book, the latter can in many ways be seen as the successor of the 1987 Red Book. The subtitle of the 1999 Red Book points out that the contract was drafted 'for building and engineering works designed by the Employer'. It is thus a contract for the procurement method of general contracting. The most interesting feature of the 1999 Red Book, according to Murdoch and Hughes (2008: p. 113), is its division into general conditions and particular conditions. The contract's foreword makes clear that these two parts together form the 'conditions of contract' that govern the rights and obligations of the parties. The general conditions contain clauses of general applicability, and they are complemented by the appendix to tender, to be found at the end of the contract, in which the parties are to specify the contract specific data, such as the period of time for completion, the governing law, or the amount of the liquidated damages. By contrast, the particular conditions allow the parties to change the general conditions. They need to be drafted for each project. Fidic has included a guidance for the preparation of the particular conditions into the 1999 Red Book which describes circumstances in which it may be appropriate to change the general conditions. This guidance also contains examples of wording for the particular conditions. Drafters of the particular conditions are further assisted by a Microsoft Word model document of the particular conditions, containing a set of columns in which the particular conditions can be inserted. This model is part of the electronic version of the 1999 Red Book. Finally, an important item of background information is that the underlying legal concepts of the 1999 Red Book are based on English law. This is so because the contracts are published in English and because the first edition of the Red Book, published in 1957, was based on the fourth version of the Conditions of Contract of the English Institution of Civil Engineers of 1954 (ICE, 1954).

4. PAYMENT: THE 1999 RED BOOK IS A ‘RE-MEASUREMENT CONTRACT’

The topic of payment is dealt with in clause 14. This clause has 15 sub-clauses. In addition, clause 1.1.4 provides definitions of payment-related terms. One thing to be learnt from the definitions is that the 'accepted contract amount' refers to the sum stated in the 'letter of acceptance' (clause 1.1.4.1) – that is, the contract price as agreed at the beginning – whereas the 'contract price' is the sum which the employer will eventually pay (clause 1.1.4.2). These two amounts will usually differ because the initially agreed price (the accepted contract amount) will be adjusted (either increased or decreased) to determine the 'contract price'. The adjustments take place according to the valuations of the works actually done (see clause 14.1). This feature makes the 1999 Red Book a so-called 're-measurement contract'. In this category of contract the works actually undertaken are valued, and the valuation takes place on the basis of the bill of quantities. The typical risk allocation implied by re-measurement contracts is that while the contractor takes the risk that the agreed price per unit is too low (i.e. lower than the actual price), the employer takes the risk that the initially estimated quantity of work turns out to be an underestimation. Re-measurement contracts are typically used for civil engineering works when large parts are below the ground surface, making the quantities very difficult to predict. Other re-measurement contracts than Fidic's Red Book 1999 are, for example, the seventh edition of the ICE conditions (ICE 7; ICE, 2007) and the Standard Building Contract (SBC) of the Joint Contracts Tribunal (JCT) in its version 'with approximate quantities' (JCT, 2009a). By contrast, the most common form of JCT SBC is its version 'with quantities' (JCT, 2009b) (referred to hereafter as JCT SBC 05), which is a lump sum contract, as is the 1999 Yellow Book of Fidic. The 1999 Red Book can easily be transformed into a lump sum contract, and the guidance for the preparation of the particular conditions, against clause 14, details the necessary steps for this transformation. In lump sum contracts the contractor takes both the risk that the agreed price per unit is too low and the risk that the initially estimated quantity of works was an underestimation.

5. RETENTION MONEY

Another issue, related to payment, is the retention money which the employer is allowed to withhold until the project has been completed. Clauses 14.3 and 14.9 of the 1999 Red Book provide several rules regarding the retention money. Interestingly, there is no default provision laid down in the 1999 Red Book regarding the percentage. Instead, the parties have to enter a percentage into the appendix to tender. This is a difference to JCT SBC 05 where a 3% default is specified and ICE 7 where a 5% default is specified. The first half of the retention money has to be paid out when the taking-over certificate is issued (clause 14.9; regarding that certificate see Section 6 of this paper). If the works are divided into sections or parts, and if the engineer issues a taking-over certificate for a section or part, a proportion of the retention money is to be released. That proportion is 40% of the estimated contract value of the section or part divided by the estimated final contract price (clause 14.9; see also Bunni, 2005: p. 579). This 40% rule is a particularity of the 1999 Red Book. Under other contracts, the proportion is 50% of the value of the completed section; see, for example, clause 4.20 of JCT SBC 05.

6. CERTIFICATES BY THE ENGINEER

The engineer has various roles under the 1999 Red Book. He is the employer's agent, certifier, designer, supervisor and decision maker. Clause 3.1(a) of the 1999 Red Book stipulates that the engineer acts for the employer. However, according to clause 3.5 the engineer has to make a 'fair determination' (if he cannot find an agreement with both parties) in cases in which clause 3.5 is referred to in the relevant clause of the 1999 Red Book (for example, a clause on claims or on a certificate). In these cases, the engineer has a quasi-judicial (impartial) role similar to that of the contract administrator under JCT SBC 2005. Whereas this concept is typical for English standard-form construction contracts, it is alien to the practice in other jurisdictions. For example, the German contract VOB/B (Vergabe- und Vertragsordnung für Bauleistungen) 2006 edition (DVA, 2006) does not mention a contract administrator (or architect/engineer) and under that contract it is for the employer to decide about the completion of the works: clause 12 of VOB/B 2006 says that the employer declares the acceptance ('Abnahme') of the works which is a broad equivalent to the practical completion certificate under JCT SBC 2005. As already pointed out, the neutral role of the engineer under Fidic’s 1999 Red Book has
a rather limited scope of application: clause 3.5 states that the engineer only has to act fairly if clause 3.5 is referred to in the relevant clause of the 1999 Red Book. These instances primarily refer to claims of the contractor for time or money. By contrast, clause 10 about the taking-over certificate does not mention clause 3.5. Thus, it seems that the engineer is allowed to make an unfair determination. This issue has also been discussed by Ndekugri et al. (2007: p. 796) who conclude that it would not be wise of the engineer to make an unfair determination to the detriment of the contractor, and to be open about it, because the contractor would then certainly apply to the (neutral) dispute adjudication board (clause 20.2 of the 1999 Red Book) to review the decision. Another feature of the 1999 Red Book is the option to agree in the contract that the engineer must not exercise any powers without the employer’s approval (see guidance for the preparation of the particular conditions, which is part of the 1999 Red Book, under clause 3). If that option is agreed, the engineer is never in a neutral role.

The study group further looked especially at the taking-over certificate (clause 10). With this certificate the engineer confirms that the works have been completed in accordance with the contract. This is a crucial step in the contract administration process. Two details are worth mentioning. First, clause 10.1 provides a fiction which benefits the contractor: if the engineer does not deal for 28 days with an application of the contractor for the taking-over certificate, the certificate is deemed to have been issued. Second, clause 10.1(a) provides that defects in the works do not prevent the certificate from being issued if they ‘will not substantially affect the use of the works . . . for their intended purpose’. In other words, in the case of minor defects the engineer should issue the taking-over certificate, and the contractor has to rectify the defects afterwards. This definition of the level of required completeness is an appropriate provision because defects which can be rectified later do not justify the withholding of the certificate, with all its consequences. This handling of defects in Fidic’s Red Book 1999 edition addresses one of the most contentious matters in construction contracts: traditionally, the relevant certificate becomes due when the works are ‘substantially complete’, and under this concept it is highly debated whether minor defects prevent ‘substantial completion’ from occurring. Regarding the views of the courts, see Murdoch and Hughes (2008: p. 192). This problem was present in the predecessor of the 1999 Red Book and it still subsists in ICE contracts (see ICE 7 clause 48.1) and JCT contracts (see JCT SBC 2005 clause 2.30.1) because there is no definition of substantial or practical completion. This shortcoming was highlighted by Latham (1994: p. 99) who stated: ‘It is surprising that there is no definition in the standard contract documents of what constitutes ‘practical completion’. This matter should be addressed by the JCT’. Similarly, the lack of a definition of practical completion in JCT contracts was qualified by Davison (2006) as ‘one of JCT’s traditional oddities’.

Other certificates of the 1999 Red Book issued by the engineer are the performance certificate (clause 11.9) which corresponds to the certificate of making good under clause 2.39 of JCT SBC 2005, the interim payment certificates (clause 14.6) and the final payment certificate (clause 14.13).

7. DELAY DAMAGES
What is usually called ‘liquidated damages’ in English contract law is referred to as ‘delay damages’ in the 1999 Red Book (see clause 8.7). There are always two questions regarding delay damages, namely ‘what is their amount?’ and ‘how is the period of delay being assessed?’ Regarding the first question, clause 8.7 provides that the amount has to be specified by the parties in the appendix to tender. Interestingly, the amount is supposed to be specified as a percentage of the ‘contract price’ (which is the final price of the works) per day, and not, as in other standard-from contracts (such as JCT contracts), as a particular sum of money per day. Another particularity of the 1999 Red Book is that the parties should specify a ‘ceiling’ in the appendix to tender which the delay damages cannot exceed, for example ‘10% of the final contract price’. The second question ‘how is the period of delay being assessed?’ is also answered by clause 8.7: the delay is the period between the ‘time for completion’ and the issuance of the ‘taking-over certificate’. Regarding this certificate see the previous section: the calculation of the ‘time for completion’ requires two steps. First, a look into the appendix of tender shows the number of days in which the works have to be completed, as specified by the parties, for example 100 days. Second, the moment when this period starts is called the ‘commencement date’. According to clauses 1.1.3.2 and 8.1 of the 1999 Red Book it is the engineer’s task to specify the commencement date. He does so by a notice to the contractor. The notice must be given ‘not less than 7 days’ before the commencement date and the commencement date has to take place within the 42 days after the contractor receives the letter of acceptance (clause 8.1). Following these two steps, the ‘time for completion’ can be assessed, and if the ‘taking-over certificate’ was issued later, the delay has to be compensated by the award of ‘delay damages’.

8. CLAIMS FOR LOSS AND EXPENSE AND CLAIMS FOR EXTENSION OF TIME
The clauses regarding claims by contractors are arguably the most cited clauses in any construction contract: contractors typically claim for compensation of loss and expense and for an extension of time. An extension of time, if granted, prevents the contractor from becoming liable for ‘delay damages’. Clause 20.1 of the 1999 Red Book considers both entitlements of contractors, namely those regarding loss and expense and extension of time. The clause stipulates a strict notice period: the contractor must give notice to the engineer no later than 28 days after he became aware of, or should have become aware of, the event that forms the basis of the claim. This time-bar clause places a large risk on the contractor because the employer will be discharged from all liabilities in connection with the claim if the notice is given too late. Time-bar clauses such as clause 20.1 do not feature in the contract JCT SBC 05. A list of the events which allow an extension of time is presented in clause 8.4. Among other events, ‘a variation’ and ‘exceptionally adverse climatic conditions’ are mentioned there. However, clause 8.4 is not comprehensive in the sense that all events are covered there, for clause 8.4(b) makes reference to other specific clauses in the 1999 Red Book where events are mentioned that justify an extension of time. Even less clearly laid out are the events that allow a claim for loss and expense: there is no clause in the 1999 Red Book which contains a list of these events. However, the study group determined a common body of writing style for the contractor’s entitlements for both
sorts of claims: the relevant clauses can easily be picked out from the layout of the contract because they are indented. Their wording is usually as follows (see clauses 2.1, 4.7, 10.3, etc.)

(a) an extension of time for any such delay . . .
(b) payment of any such cost . . .'.

A full list of the relevant events can be compiled accordingly. In conclusion, in the 1999 Red Book the events that justify claims are contained in clauses which are spread out over the whole contract; the applicable clauses can be found where the relevant subjects are. This approach differs strikingly from the contract JCT SBC 2005 where comprehensive lists of events exist: relevant events for claims for extension of time are contained in clause 2.29, and relevant matters for claims for loss and expense are contained in clause 4.24. The JCT approach appears to be preferable for users who want to ascertain whether they have a claim against the other party.

9. DISPUTE ADJUDICATION BOARD

Previous versions of Fidic’s Red Book stipulated that any dispute had first to be referred to the engineer before it could be referred to arbitration. This is different in the 1999 Red Book. The engineer’s decision has been replaced by the decision of an impartial dispute adjudication board (DAB). The relevant provisions can be found in clauses 20.2 to 20.4 of the contract, and additional rules on the DAB are laid down in the appendix entitled ‘general conditions of dispute adjudication agreement’, the annex ‘procedural rules’ (both documents can be found after the general conditions), the appendix to tender and the dispute adjudication agreement (both documents are in the section ‘forms’ of the 1999 Red Book). The DAB consists of one or three members, dependent on the parties’ determination in the appendix to tender. One of the innovative features of the DAB is that its members visit the site on a regular basis unless the parties decide for an ad hoc DAB when the dispute arises. Such site visits have the purpose to enable the DAB members to become and remain acquainted with the progress of the works and of any actual or potential problems or claims (see annex procedural rules 1 and 2). This feature can provide the members of the DAB with first-hand information unavailable to judges or arbitrators who are called upon when the dispute arises.

Corbett (2002: p. 3) praises the new DAB as a feature of ‘best practice’ and he expects substantially reduced durations of disputes.

The decision of the DAB is binding for both parties (clause 20.4). If any party is dissatisfied with the decision, it must issue a notice of its dissatisfaction to the other party within 28 days (clause 20.4). The parties can then attempt to solve the dispute by amicable settlement (clause 20.5) or refer it to arbitration (clause 20.6). If arbitration is chosen, clause 20.6 refers to the rules of arbitration of the International Chamber of Commerce (ICC) which are often adopted for international contracts. A schematic illustration for the typical sequence of dispute resolution and time periods under the 1999 Red Book can be obtained at the early pages of the contract.

10. VALUE ENGINEERING

Clause 13.2 incentivises the contractor to suggest changes to the works which, if adopted, would benefit the employer. For example, such changes can lead to a quicker completion or a reduction of the construction or maintenance costs of the building. This is referred to as ‘value engineering’ in the 1999 Red Book. It is an incentive for the contractor because he shares 50% of the financial benefit which his suggestions bring to the employers. According to the clause, the benefit equals the difference between the cost savings on the one hand and the reduction (if any) of the value which the project has for the employer on the other.

Corbett (2002: p. 4) provides the example of a cheaper turbine which leads to higher maintenance costs. Here, the net benefit may be less than the savings in capita cost.

11. OTHER FEATURES OF THE 1999 RED BOOK

Other interesting and important features of the contract are, among others: the entitlement of the contractor to request evidence of the employer’s financial arrangements to pay the contractor (clause 2.4); the requirement of monthly progress reports by the contractor (clause 4.21); the possibility to extend the 365 days defects notification period (during which the contractor has to remedy defects) by up to 2 years if a defect or damage prevents the use of the works for their intended purpose (clause 11.3); the employer’s right to terminate the contract for convenience subject to a 28-day notice period (clause 15.5); the contractor’s right to suspend the works in case of late payment or late certification (clause 16); the limitation of liability according to which both parties are not liable to the other party for consequential damages such as damages for loss of use of any works or loss of profit (clause 17.6); and the entitlement of the contractor to claim for loss and expense and additional time in case of force majeure, the definition of which is well laid out in the contract (clause 19).

12. CONCLUSION

This study examined the main features of the 1999 Red Book. While many concepts of the contract are similar to the concepts of the standard-form contracts commonly used in the English jurisdiction, other concepts of Fidic are different. This is especially true regarding the strict notice periods for the contractor’s claims and the DAB that visits the site regularly from the beginning of a project. Another finding of the study group was the experience that the process of familiarisation with a new standard-form contract will inevitably take time, but that this time investment is worthwhile because it deepens the understanding of how construction contracts work.

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