

## ***FIDIC 2017 – A Practical Legal Guide***

**by Corbett & Co**

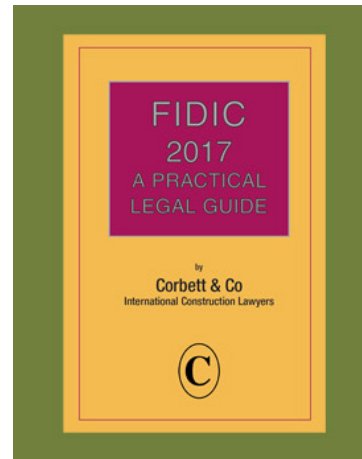
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*Reviewed by Dr Donald Charrett*



This comprehensive 807-page work was written by Corbett & Co directors, consultants and staff, and published by Corbett & Co in 2020. As the title indicates, the book is (generally) confined to the clauses in the 2017 rainbow suite: the Red Book, the Yellow Book and the Silver Book. It contains sections: Introduction, Table of Cases, Yellow Book, Red Book, three appendices on draft notices, flow charts of principal events and tables of sub-clauses, and an index. The book is currently available in hardback, although Corbett & Co advise that an e-book and Kindle version will also be available soon.

The short introduction by Edward Corbett highlights the best features of the 2017 editions that resolved issues with the 1999 forms, as well as other features of interest. Corbett pulls no punches in highlighting those features he believes are ill-considered or poorly drafted. In particular, he sees the length of about 50,000 words as far too long and 'the draft needed vigorous editing'.

The main section of book (comprising 577 pages) is headed 'Yellow Book' and has the simple and logical structure of each clause covered in a chapter written by one or more of the 12 different authors. Each chapter provides primary commentary on the clauses in the Yellow Book, with supplementary commentary in respect of the Red Book and the Silver Book where necessary. In the majority of chapters, the Red Book and Silver Book commentary is located after the description of the Yellow Book provisions. In the chapters for clauses 4 and 12, the Red Book and Silver Book commentary is included within the discussion of the Yellow Book sub-clauses, albeit under clearly identified sub-headings. There are references

to the provisions of the 2019 Emerald Book (incorrectly referred to as the 2017 Emerald Book) in only four chapters – those written by Victoria Tyson. The short separate section on the Red Book (17 pages) provides chapters on clause 5 (Subcontracting) and clause 12 (Measurement and Valuation).

Each clause chapter commences with a summary, generally followed by a discussion of the origin of the clause, highlighting new features or changes from the 1999 Yellow Book, with references to relevant predecessors such as the 4th edition Red Book or the 1995 Orange Book. In the chapter on clause 6 (Staff and Labour), this section details the changes from the 1999 Yellow Book for each sub-clause. The chapters treat each sub-clause in detail, with subheadings and sub-subheadings appropriate to the different issues involved. Given the detail with which each sub-clause is treated, the use of subheadings and sub-subheadings ensures that the reader can readily find the appropriate text on any relevant issue without having to wade through pages of information on peripheral issues. Where FIDIC have issued an erratum to the wording of a sub-clause, this is helpfully identified in the book.

The wealth of detail in respect of each of the sub-clauses provides some invaluable information in summary form. For example, under the subheading 1.1.19 'Cost', there is a list of the sub-clauses under which the Contractor may be entitled to Cost. Similarly for the subheadings 1.1.20 'Cost Plus Profit' and 1.1.38 'Extension of Time' there are lists of the sub-clauses that may give the Contractor an entitlement. Highlighting the importance of the Employer's requirements,

under subheading 1.1.33 there is a detailed list of things that may be included, each item cross-referenced to a sub-clause or the Guidance. Other valuable cross-reference lists of relevant sub-clauses occur at various other locations of the book.

The case law referred to in the clause chapters is predominantly English, but also includes cases from other common law and civil law jurisdictions, as well as arbitration awards. There are many references to the common law position or meaning of words or phrases under English law, indicative of the common law position elsewhere. FIDIC emphasises that the rainbow suite is intended for international contracts in any jurisdiction, civil law and common law. Highlighting the few differences in the application of FIDIC contracts between civil law and common law jurisdictions, this comprehensive and detailed book has only eight references to specific areas of civil law that differ from common law: delay damages, good faith, gross negligence, decennial liability, *force majeure*, *imprévision* and direct loss.

There are inevitable differences in style and treatment arising from the different chapter authors, such as the extent of the summary, the origin of each clause at the start of each chapter, the use of figures and the level of detail of the explanatory material. However, every chapter treats the subject matter of the relevant clause in considerable detail. Not surprisingly, the chapters on clause 20 [Employer's and Contractor's Claims] and clause 21 [Disputes and Arbitration] are appropriately lengthy (56 and 64 pages respectively), given the extent to which these clauses prescribe the detailed procedures and time bars in the 2017 rainbow suite.

Appendix 1 contains draft Notices for use by the contractor, employer or engineer to comply with the notification requirements of the rainbow suite. The formal and prescriptive requirements of the 2017 forms is highlighted by the 135 Notices detailed in Appendix 1. The table of contents preceding the text of the draft Notices identifies each of these Notices by sub-clause number, as well as a description of the Notice. The format of each Notice follows the same format. The heading identifies the sub-clause number, title, description and which entity issues the Notice: contractor, employer or engineer. The body of each Notice specifies to whom it is to be sent and the entities to receive copies,

defines when it is required to be issued and details what must be included in it. In addition to the Notices required for the General Conditions in the Yellow Book, Appendix 1 contains eight draft Notices for optional conditions from the Special Provision section of the Yellow Book.

For anyone involved in administering a 2017 FIDIC contract, Appendix 1 alone justifies the cost of this book. It will save many hours of scrutiny of the requirements of the General Conditions and for the necessary drafting to comply with those requirements. The meticulous preparation of these draft Notices is a substantial contribution to the proper administration of 2017 rainbow suite contracts, by providing a comprehensive collection that identifies the issues that need to be formally communicated. The Contractor, Employer or Engineer who issues all the relevant Notices identified in Appendix 1 will undoubtedly minimise the chances of ending up in dispute, or the costs of an unavoidable dispute, by having the contractually required and appropriate paper trail comprehensively documented.

Appendix 2 contains five flowcharts for the Yellow Book: sequence of principal events, payment, referral of a Dispute under clause 21, agreement or determination under sub-clause 3.7 which includes an error, and agreement or determination under sub-clause 3.7 where no agreement is reached. These flowcharts are similar to those included in the 2017 Yellow Book, although formatted differently and with additional explanatory information. As with the diagrams included in various clause chapters, the flow charts are very clear and useful visual representations of the necessary events and procedures that inform the navigation of the relevant sub-clauses for significant issues.

Appendix 3 contains a table of sub-clauses and the sub-clauses referred to therein. The length of this table (20 pages) highlights the interconnected nature of the contractual provisions, and the importance of being familiar with all of the clauses. It is a useful aide-memoire of the other issues that need to be borne in mind when addressing a particular sub-clause.

The index is very comprehensive, occupying 87 pages. It provides information relating to clauses and sub-clauses of the 2017 rainbow suite under either the name, or number, or subject matter of the clause or

sub-clause. The index also includes legislation and bibliographical references. The index is a very important component of the book as it identifies the various routes available to any desired destination. Because it is so comprehensive some of the index entries have an extensive list of sub-entries extending over a page or more; this requires care in using the index to locate the relevant main index entry. This is a small (and inevitable) price to pay for such a comprehensive cross-referenced index.

In addition to a hard copy, this reviewer had the benefit of a soft copy. Quite apart from the convenience of having the book available on an electronic device, a soft copy enables keyword searches that can find the proverbial 'needle in a haystack'. The Covid-19 pandemic has emphasised the importance of electronic communications, and highlighted the constraints of traditional technologies, such as the interruptions to supply chains and delays in deliveries. The availability of this book in soft copy will avoid these supply chain issues and provide additional functionality. Many libraries and practitioners will no doubt obtain the book in electronic form for these advantages when it is available.

In this reviewer's view, *FIDIC 2017 – A Practical Legal Guide* is an essential addition to the library of every practitioner who is involved with the FIDIC 2017 rainbow suite, whether as front end or back end lawyer, employer, contractor, engineer, claims consultant, Dispute Avoidance/Adjudication Board member or arbitrator. It will be an important resource for students of construction law. They will all value it for its completeness, its depth and clarity in explaining how the sub-clauses function, for highlighting the changes from the 1999 rainbow suite and for providing a road map of the interconnection between sub-clauses. The draft Notices will no doubt form part of contract administration manuals that will ensure Notices are submitted correctly and timeously, claims can be assessed expeditiously, and dispute avoidance enhanced. As many writers have observed, good communication is at the heart of dispute avoidance. The team at Corbett & Co are to be congratulated on their magnum opus that will facilitate a better understanding of FIDIC contracts and encourage the detailed communication that is an integral feature of the 2017 rainbow suite, and essential for dispute avoidance.