



# ICA ARBITRATION QUARTERLY JOURNAL

Vol 218 | July-September, 2023



**INDIAN COUNCIL OF ARBITRATION**  
Undisputed Leader in Dispute Resolution

# THE FIDIC RED BOOK CONTRACT: 'AN INTERNATIONAL CLAUSE-BY-CLAUSE COMMENTARY'



**Christopher Seppala**

Partner of Counsel,  
Paris, White & Case

This Book is on a subject not often written about and that is ironical, given the significance of the construction industry globally and in India.

The construction industry is the second largest industry in India (after agriculture) and accounts for 11% for India's GDP. Its current market size is estimated at 650 billion US\$. A recent report by Global Construction forecasts the worldwide construction volume output to grow by 85% to 15.5 trillion US\$ by 2030, with China, USA and India leading the way and accounting for about 57% of the global growth. Construction activity thus is a key driver of the global and Indian economy. At the same time, the growth has been accompanied by a spurt in mega disputes,

resulting in a multi-pronged adverse effect on the sector.

This brings us to the relevance of the FIDIC Red Book.

**About FIDIC:** Founded in 1913 and headquartered in Geneva, FIDIC is a global representative body of national associations of consulting engineers. FIDIC is best known for its suite of construction contracts, which with time have become the predominant guide for all type of construction contracts. The FIDIC suite of contracts and their subject matter is popularly recognized by their colour branding. The most widely used are the Red Book, covering conditions of contract for construction; the Yellow Book, covering conditions of contract for plant and design-



build and the Silver Book, covering conditions of contract for EPC / turnkey projects. This 'Rainbow Suite' follows a common structure and vocabulary rendering them user friendly. The pervading impact of the FIDIC suite of contracts can be seen from the fact that the World Bank; Asian Development Bank; Inter-American Development Bank; European Bank for Reconstruction and Development; Islamic Development Bank (and many Multilateral Development Banks) require their borrowers and aid recipients to adopt the FIDIC conditions of contract for projects, including for the bidding documents. In India, the FIDIC suite of contracts are often used for large scale infrastructure projects.

**The FIDIC Red Book:** The FIDIC Red Book is the most commonly used standard form for international construction contracts and is also referred to as the flagship contract. It is an essential tool relevant for all stages of construction projects, including its drafting, negotiation, performance, interpretation, administration and disputes resolution.

The first edition of the Red Book dates back to 1957. Its fundamental principles were noted in an Explanatory Memorandum as a clear and logical sequence of clauses, removal of ambiguities and a fair distribution of risks to, “hold the balance fairly between employers and contractors”. As the author notes, these

fundamental principles continue to apply to date. The 1957 Red Book also crafted a basic structure which endures, namely to group clauses of universal application as 'General Conditions' and in a second part the 'Particular Conditions' (to be moulded to suit particular requirements). The Red Book contains Guidance for preparation of Particular Conditions. This basic structure permeates all FIDIC contracts.

**The Book:** The Book under review contains five distinctive chapters:

The first chapter is a comprehensive and instructive introduction. Amongst various matters, the author introduces FIDIC as an organization, its various suite of contracts, and how they are prepared. He also highlights the distinctive features of FIDIC's latest suite of contracts, including the balanced risk sharing between employer and contractor, as well as multiple clauses allowing for adjustment of contract price or time for completion due to unforeseen events. (This is specially useful in light of the recent disruptions engendered by covid).

The second chapter is titled “Applicable Law”. It discusses legal principles common to all legal systems, followed by a comparison of the common law and civil law in relation to construction contracts. This includes the duty of good faith (if any); the difficulties of non-performance; the role of the contract administrator; sub-

contractors direct rights; liquidated damages; limitation on damages; force majeure etc. Common law lawyers in India would particularly benefit from Mr. Seppälä's astute insights into civil law practice, especially where they are advising on construction contracts with an element of or counter-parties from civil law jurisdictions.

The third chapter is devoted to interpretation of contracts, the different approaches and the widely accepted principles. The peculiarities of interpreting a FIDIC contract are considered with reference to case law. An interesting section here is how international arbitrators interpret contracts and how it differs from the way judges of national courts do.

The fourth chapter is the heart of the Book and contains the commentary on the General Conditions of the Red Book. The Red Book comprises of 21 Clauses and 168 sub-clauses. The author discusses each sub-clause in a structure as below:

- first, the concerned clause is paraphrased / simplified with its key ingredients fleshed out.
- second, the historic changes and drafting history is summarized.
- third comes a very useful section, which refers to all 'related clauses'. A contract is to be read and interpreted as a whole.

Unraveling the interconnection and interdependence of 168 sub-clauses can be a very daunting task. This section thus is very helpful to understand the purport, scope and effect of the various clauses.

- next comes the 'analysis' section, where each relevant limb of the clause is taken up. Here, the global depth of the treatise comes out. To illustrate, I have picked up the commentary on clause 18.6 of the Red Book. Clause 18 of the Red Book deals with 'Exceptional Events' – (in the 1999 version it was known as the force majeure clause) and sub-clause 18.6 thereof deals with the parties being released from performance, including on account of an 'Exceptional Event'. Here, while analyzing the ingredient of the contract becoming 'impossible to perform', the author notes a Bombay High Court decision and an interim ICC award of 1987. In dealing with the next limb of the contract becoming 'unlawful to perform', the author refers to a 1918 House of Lords decision. Then follows a 'related law' section, where the author deals inter alia with the civil law doctrine of force majeure; the English doctrine of frustration; the US doctrine of impracticability and finally, the relevant UNIDROIT principles, thereby giving a global perspective of

circumstances under which parties may be released from their contractual obligations.

The fifth and final chapter of the Book comments on the other documents ancillary to FIDIC's General Conditions including documents concerning DAAB Agreements.

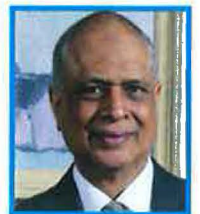
Considering that the Red Book is meant for international use, the book encompasses the law and practice of common law as well as civil law jurisdictions (including countries whose Codes are inspired by Islamic law). Its international relevance is strengthened by reference to international legal principles and international arbitral awards as well.

The author points to the ground reality that large infrastructure works are often located in developing countries, where the applicable law may not address many legal issues which arise. The author also highlights an emerging “soft law of contract on a worldwide scale”, an example of this being the UNIDROIT Principles of International Commercial Contracts, 2016. These can be adopted by the parties as the governing law of the contract or otherwise deployed to interpret or supplement the governing law.

The Book thus is a one stop source, encompassing not only the FIDIC Red Book but the construction law jurisprudence surrounding it, including the corresponding provisions of the FIDIC Yellow Book and Silver Book. To describe the Book as a 'commentary' on the Red Book does not do justice to its breadth and insights.

About the Author: There are few people who can speak on the Red Book with the authority with which Mr. Seppälä can. For over 30 years, he has served as a legal / special advisor or as a member of the FIDIC contracts committee. His present roles include serving as a Dean of the Faculty of Contracts of the FIDIC Academy (FIDIC's learning and development body). As legal advisor and member of FIDIC's Update Task Group, he had a role in preparing the Red Book, Yellow Book, Silver Book published in 1999 and advised FIDIC in relation to the latest FIDIC Suite (2017, as updated in 2022).

His keen insights and unique vantage point makes the treatise an authority on the subject.



**Sumeet Kachwaha**  
Partner  
Kachwaha & Partners