

May 16th, 2019

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Trends in Standard Forms of Contracts:

Introduction

May 16th, 2019

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9:05

Contracts and Project Management

Trends in Standard Forms of Contracts

Panel Leader

Victoria Tyson, UK

Vincent Leloup, France

New White Book FIDIC 2017 Edition

Zoltán Záhonyi, Hungary

New Red and Yellow Book 2017 Edition

Rob Horne, UK

New NEC4 / UK Standard Form

Further Panelists

Chakravarthi Nandakumar, India

Robert Werth, Germany

10:00

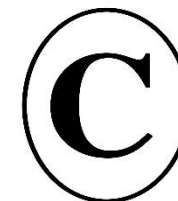
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Vincent Leloup
FIDIC Contracts Committee
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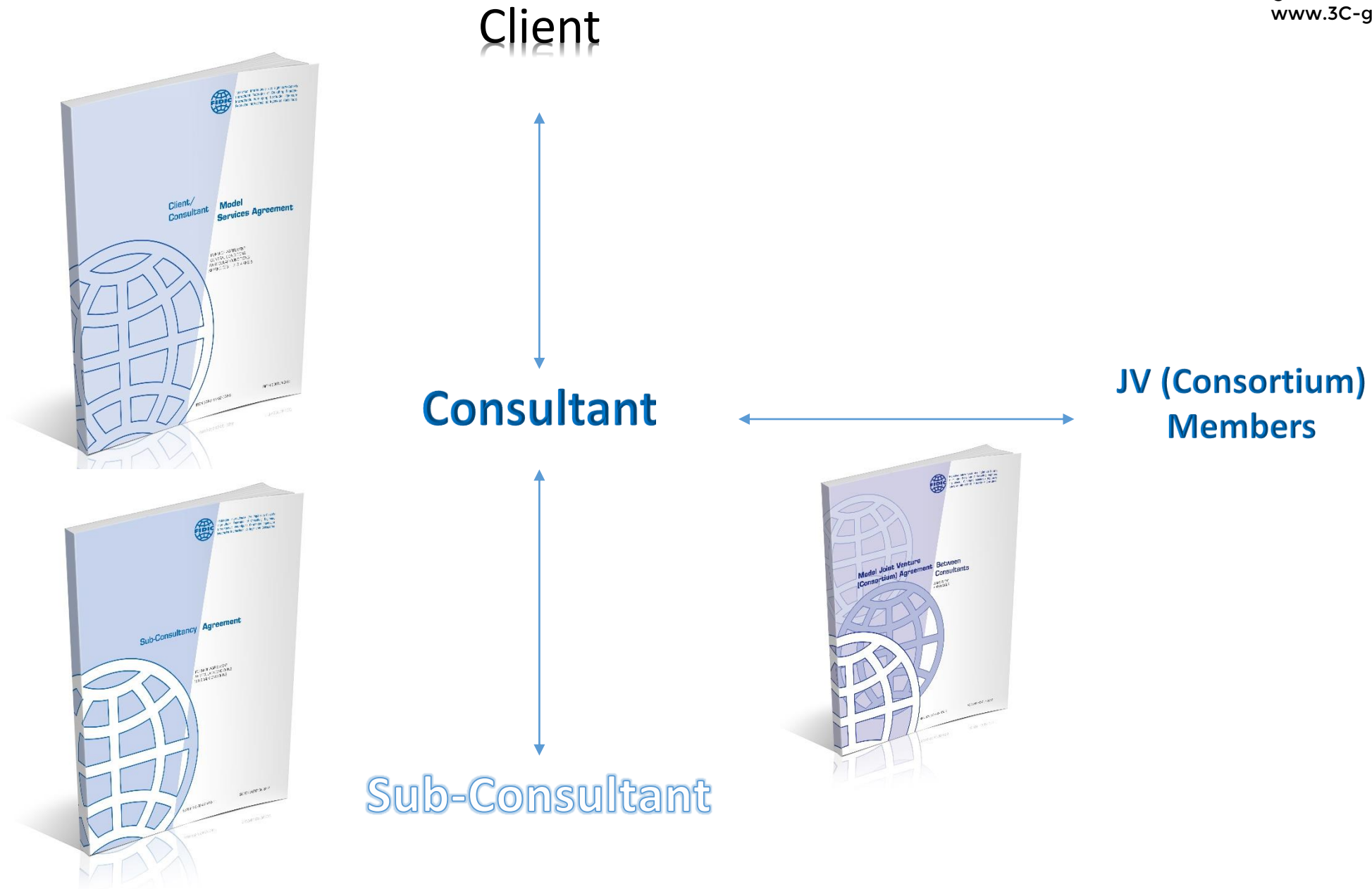
Trends in Standard Forms of Contracts:

The new FIDIC White Book, 2017 Edition

FIDIC 2017 Suite of Agreements

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Main features and structure of the 2017 White Book

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Typical use of the 2017
White Book

Consultant acting as
Engineer under a
Works Contract

Consultant acting
as designer for a
Design-Build
Contractor

Consultant
delivering
technical
assistance, project
management or
advisory services

Copyright, acknowledgements, foreword

Form of Agreement

Particular Conditions

- Part A – References from Clauses in the General Conditions
- Part B – Additional or Amended Clauses

Appendices to the Agreement - 1 to 5

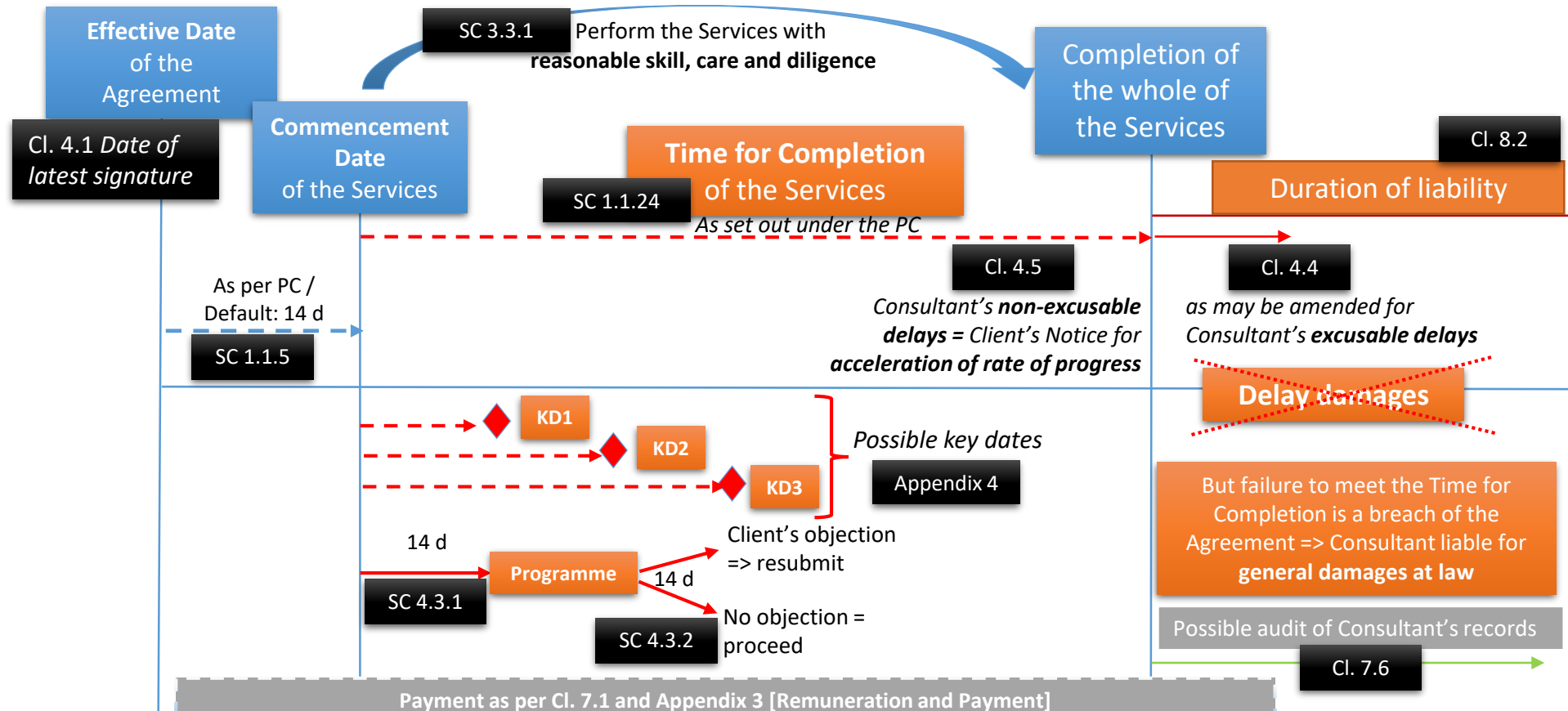
General Conditions of the Client / Consultant Model Services Agreement

**FIDIC 2017 White Book
Structure**

Time line under the White Book 2017

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The FIDIC White Book 2017 position

SC 3.3.1: *Notwithstanding any term or condition to the contrary in the Agreement or any related document or any legal requirement of the Country or any other relevant jurisdiction (including, for the avoidance of doubt, the jurisdiction of the place of establishment of the Consultant), in the performance of the Services **the Consultant shall have no other responsibility than to exercise the reasonable skill, care and diligence to be expected from a consultant experienced in the provision of such services for projects of similar size, nature and complexity***

SC 3.3.2: *To the extent achievable using the standard of care in Sub-Clause 3.3.1, and **without extending the obligation of the Consultant beyond that required under Sub-Clause 3.3.1**, the Consultant shall perform the Services with a view to satisfying any **function and purpose** that may be described in Appendix 1 [Scope of Services].*

...but the Consultant does not give a warranty that they will be met

Standard of performance is: reasonable skill, care and diligence...**not** fitness for purpose

Function and purpose of the services required by the Client are noted...



Connections FIDIC White Book / FIDIC forms of Works Contracts

FIDIC White Book, 2017 Edition

SC 3.9.3

*When acting as the engineer, employer's representative, project manager or similar, the Consultant shall have the **authority to act on behalf of the Client** to the extent provided in the Works Contract. If the **authority of the Consultant under the Works Contract is subject to prior approval of the Client**, then the Client warrants that such restriction on the authority of the Consultant shall be stated in the Works Contract or shall be made known in writing to the contractor under the Works Contract*

FIDIC Pink Book, 2010 Edition

SC 3.1 – Engineer's Duties and Authority

The Engineer may exercise the authority attributable to the Engineer as specified in or necessarily to be implied from the Contract...whenever carrying out duties or exercising authority, specified in or implied by the Contract, the Engineer shall be deemed to act for the Employer.

SC 3.1 – Engineer's Duties and Authority

If the Engineer is required to obtain the approval of the Employer before exercising a specified authority, the requirements shall be as stated in the Particular Conditions. The Employer shall promptly inform the Contractor of any change to the authority attributed to the Engineer.



The FIDIC White Book 2017 position

SC 8.1.3

If either Party is liable to the other, damages shall be payable only on the following terms:

*(a) such damages shall be limited to the amount of **reasonably foreseeable loss and damage suffered as a direct result of such breach**;*

*(b) in any event, the amount of such damages shall be **limited to the amount stated in Sub-Clause 8.3.1 [Limit of Liability]**; and*

*(c) if either Party is considered to be liable jointly with third parties to the other Party, the **proportion of damages payable by that Party shall be limited to that proportion of liability which is attributable to its breach.***

Exclusion of liability

Liability limited to **direct losses which are reasonably foreseeable** (at the time of Agreement formation)

SC 8.1.3

SC 8.3.3

Indirect, special or consequential loss or damage are excluded from liability

Limitation of liability

Liability limited to **a cap stated in PC**
SC 8.3.1 & 8.3.2.

SC 8.2

Liability limited in **time** as stated in PC

SC 8.4.1

Exclusion and limitation do not apply in case of deliberate default, fraud, fraudulent misrepresentation, reckless misconduct

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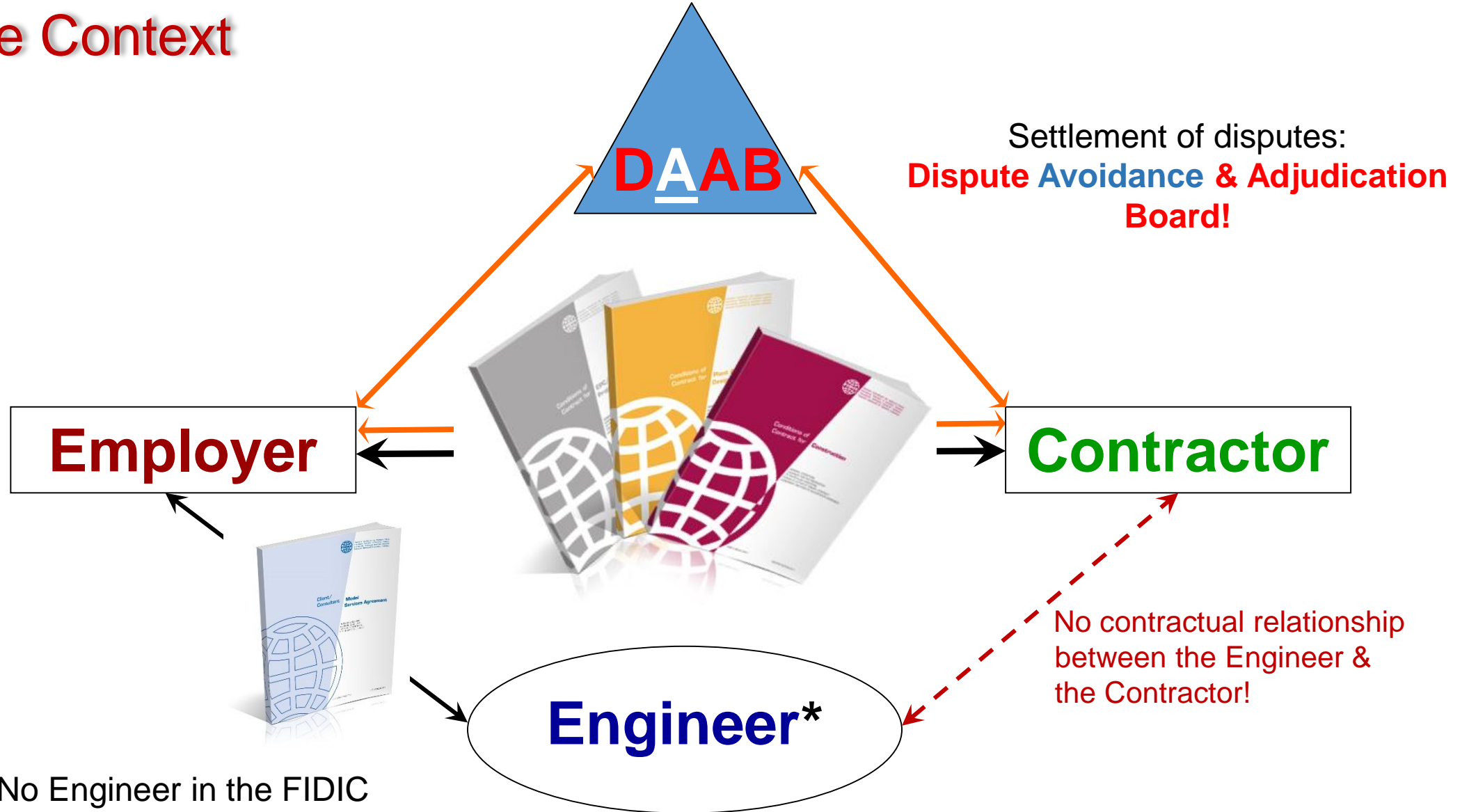
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Trends in Standard Forms of Contracts:

The New Red and Yellow Book FIDIC 2017 Edition

FIDIC 2017 Suite of Contracts

The Context



* No Engineer in the FIDIC Silver Book !

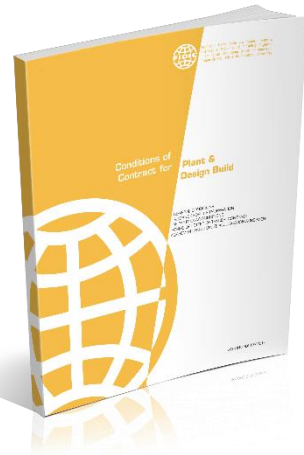
FIDIC 2017 Suite of Contracts

Applicability, Scope, Types of Projects & Contents

Basically: No change



Balanced risk sharing
Contractor's design
Mainly E&M Works or D&B projects
Large-scale International projects
The Engineer administers the project/contract implementation
DAAB



Balanced risk sharing
Employer's design
Mainly Building and Construction
Large-scale International projects
The Engineer administers the project/contract implementation
DAAB



More Contractor's risk (But: READ THE 'NOTES'!)
Contractor's design (+ engineer & procurement) facility to be provided on turnkey basis
Large-scale International projects
No Engineer
DAAB

Each Includes:

- ✓ GENERAL CONDITIONS
- ✓ APPENDIX: GENERAL CONDITIONS OF DISPUTE AVOIDANCE / ADJUDICATION AGREEMENT
- ✓ DAAB PROCEDURAL RULES
- ✓ GUIDANCE FOR THE PREPARATION OF PARTICULAR CONDITIONS
- ✓ CONTRACT DATA AND ANNEXES: FORMS OF SECURITIES
- ✓ FORMS OF
 - LETTER OF TENDER,
 - LETTER OF ACCEPTANCE,
 - CONTRACT AGREEMENT and
 - DISPUTE ADJUDICATION/ AVOIDANCE AGREEMENT

What is NEW / Different? – More Clarity & Certainty

- New terms & expressions became defined (e.g. “*Extension of Time*”; “*Key Personnel*”; “*Notice*”; “*NOD*” etc.)
- Many contractual processes became more structured (–» 3 digit subdivision of Sub-Clauses)
- Some features, used to be implicit/implied in the 1999 Forms, many of these became now **EXPLICIT**.

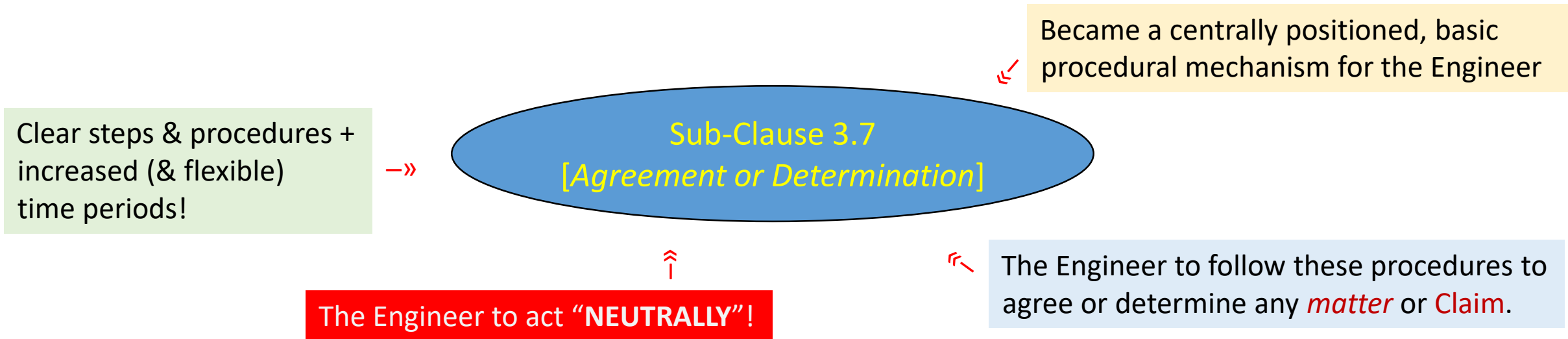
EXAMPLE:

Sub-Clause 13.3.1 [*Variation by Instruction*] to apply under the following Sub-Clauses:

- 1.9 – correction of errors in the Employer’s Requirements [YB only]
 - 4.7.3 – correction of errors in the items of reference [RB & YB only]
 - 4.12 – Unforeseeable physical condition (if instruction found to be a Variation) [RB & YB only]
 - 8.7 – revised methods for accelerating progress
 - 8.12 – prolonged suspension (if works are omitted)
 - 11.4 – Contractor’s failure to remedy (if works are omitted)
 - 17.2 – Contractor’s rectification of a damage
- } [All the 3 books]

What is NEW / Different?

– Engineer’s Position Strengthened



FURTHERMORE:

There shall be no requirement for the Engineer to obtain the Employer’s consent before the Engineer exercises his/her authority.

Parties’ joint request for DAAB assistance may not be made during the period the Engineer is carrying out his/her duties under Sub-Clause 3.7 on the matter at issue or in disagreement (unless the Parties agree otherwise).



What is NEW / Different?

– Improved Claims & Dispute Procedures

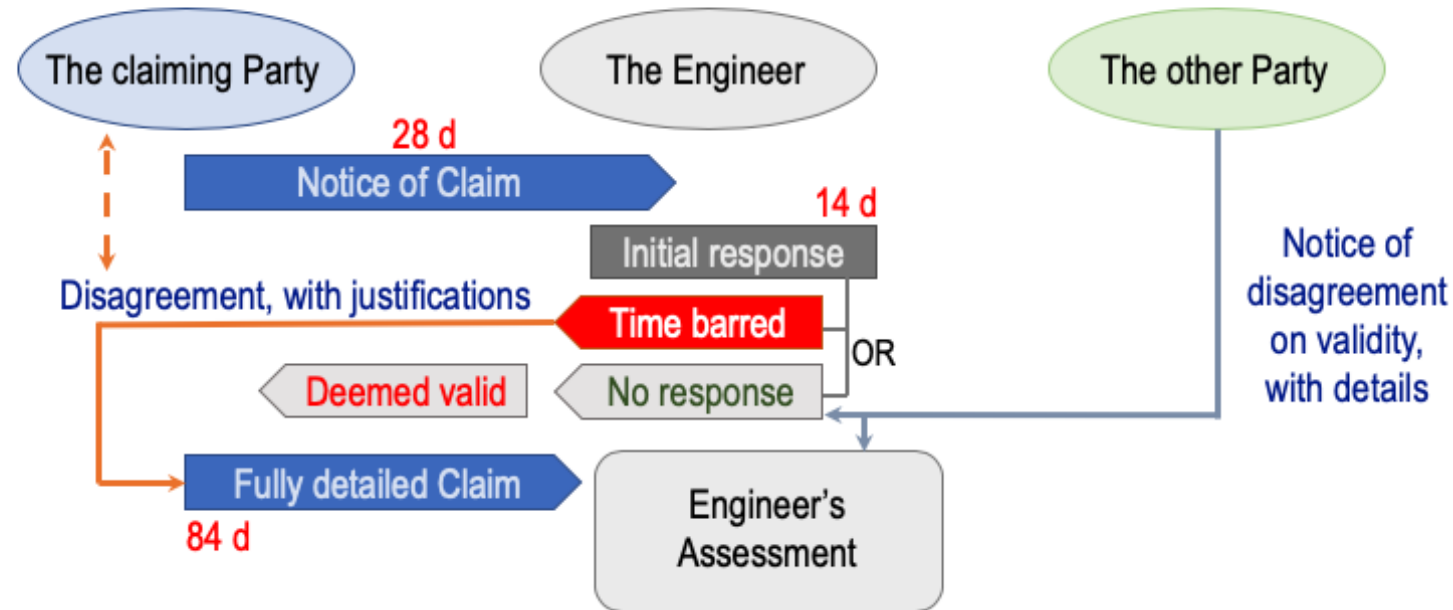
- » The terms “*Claim*” & “*Dispute*” became defined
- » The “*Claim*” and the “*Dispute*” procedures became separated (see Clause 20 and Clause 21)
- » The Employer’s Claims and Contractor’s Claims are treated equally (see: “*Claiming Party*”)
- » The Engineer has more active role (see: initial response + functions under S-CI 3.7)
- » No more “dead end streets” (see: deemed outcomes, if a stakeholder fails to act within time limit set)
- » DAAB in the 2017 Editions (new feature of “*avoidance*” is added)
- » Clause 21 [*Disputes and Arbitration*] became more structured, hence, easier to follow

FIDIC 2017 Red & Yellow Book

What is NEW / Different?

– More Procedures & Time Limits

EXAMPLE: **NEW FEATURE:** [20.2.2] Engineer's initial response [= streamlining & escape].



CONCLUSIONS:

Release of the FIDIC Construction Contracts 2017 Updates is

GOOD NEWS for practitioners preparing and managing construction contracts (at remote corners of the World possessing less confidence / relevant experience)

BAD NEWS for dispute lawyers (maybe)



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Trends in Standard Forms of Contracts:

NEC4



What's in the box?

Contracts

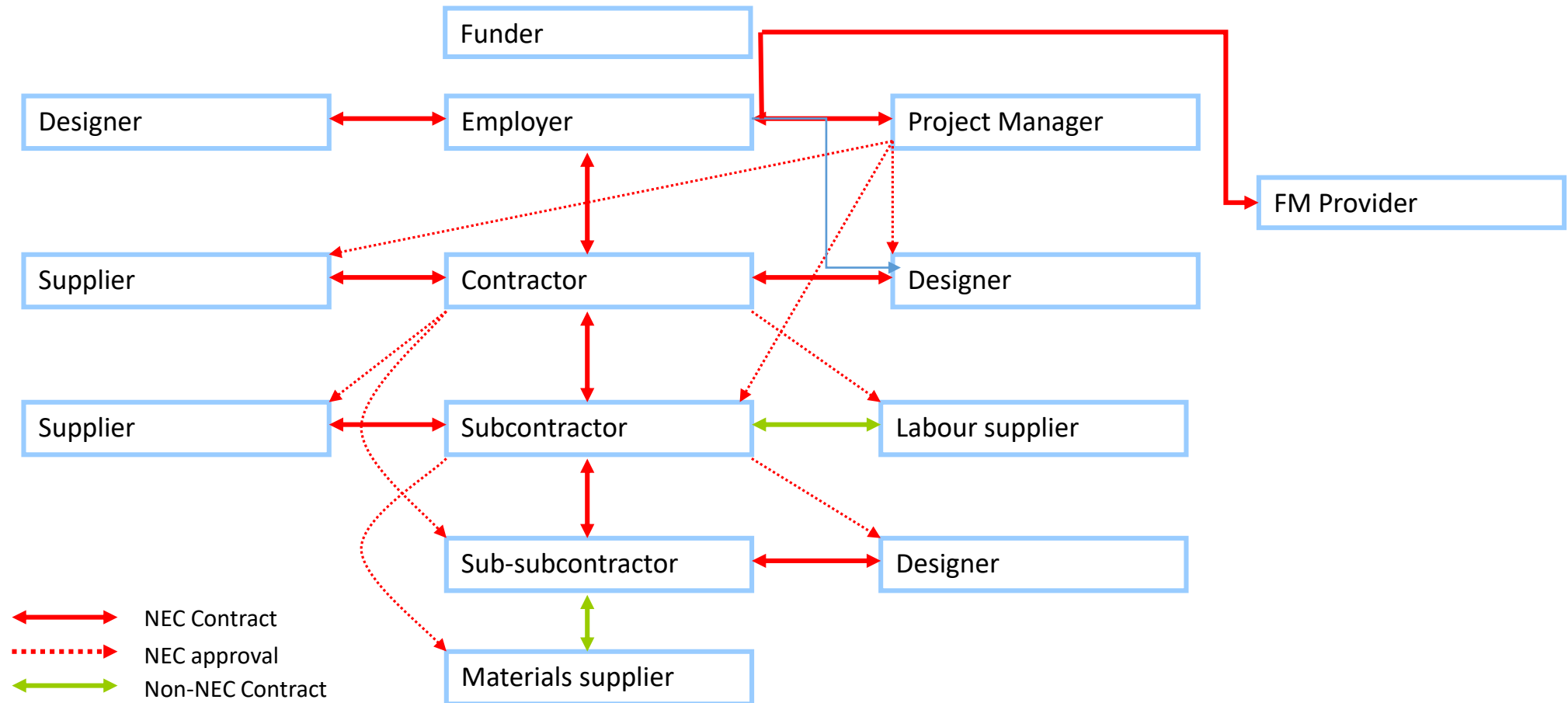
- Engineering Construction Contract (ECC)
- Engineering Construction Short Contract (ECSC)
- Engineering Construction Sub-Contract (ECS)
- Engineering Construction Short Sub-Contract (ECSS)
- Term Service Contract (TSC)
- Term Service Sub-Contract (TSS)
- Term Service Short Contract (TSSC)
- Professional Services Contract (PSC)
- Professional Services Sub-Contract (PSS)
- Professional Services Short Sub-Contract (PSSS)
- Design Build Operate Contract (DBO)
- Alliance Contract (Alliance)
- Supply Contract (SC)
- Short Supply Contract (SSC)
- Framework Contract (FC)
- Dispute Resolution Contract

Guidance Notes

- | | |
|---|--|
| <ul style="list-style-type: none">• Preparing an Alliance Contract• Preparing an Engineering and Construction Contract• Preparing an Engineering and Construction Short Contract• Preparing a Professional Service Contract• Preparing a Professional Service Short Contract• Preparing a Term Service Contract• Preparing a Term Service Short Contract• Preparing a Design Build and Operate Contract• Preparing a Supply Contract• Preparing a Supply Short Contract• Preparing and Managing a Dispute Resolution Service Contract• Preparing and Managing a Framework Contract | <ul style="list-style-type: none">• Managing an Alliance Contract• Managing an Engineering and Construction Contract• Managing an Engineering and Construction Short Contract• Managing a Professional Service Contract• Managing a Professional Service Short Contract• Managing a Term Service Contract• Managing a Term Service Short Contract• Managing a Design Build and Operate Contract• Managing a Supply Contract• Managing a Supply Short Contract |
| | <ul style="list-style-type: none">• Establishing a Procurement and Contract Strategy• Selecting a Supplier |



What it looks like in practice





Features and Structure of the Suite

1. General
 2. Contractor Responsibilities
 3. Time
 4. Quality Management
 5. Payment
 6. Compensation Events
 7. Title
 8. Liabilities & Insurance
 9. Termination
- Main Options (A, B, C, D, E, F)
 - Secondary Options (W, X, Y)
 - Amendments (Z)

 - Contract Data
 - Schedule of Cost Components
 - Scope
 - Site Information

 - Guidance and Practice Notes



What sets it apart

1

Communications

- Formal scheme (Cl 13)
- Notices separate (13.7)
- Sufficient detail (13.4)

2

Risk Management

- Early warnings (Cl 5)
- Required meetings (15.2)
- Up to date Register (15.4)

3

Time and Programmes

- Programme for the start (Cl 31)
- Required detail (31.2)
- Updates (32.1)

4

Change

- Time & Money (Cl 60)
- Prospective (63.1)
- Time bars (61.3)

5

Completion

- Defined (Cl 11.2(2))
- Detail in Scope not terms
- Usability test

6

Disputes

- Secondary Option (W)
- Adjudication
- DRB/Escalation



Pros and Cons

For NEC

- Availability of management tools
- Simple language, accessible
- Promotes collaboration
- Extensive and successful UK track record
- Adaptable and flexible for different situations
- Whole suite written together to interact

Against NEC

- High cost to start and manage processes
- Processes are complex with few easy fixes once of track
- Low profile internationally, questionable fundability
- Prone to significant and poor amendment

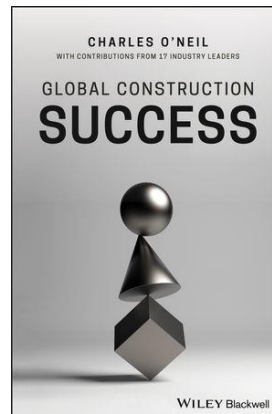
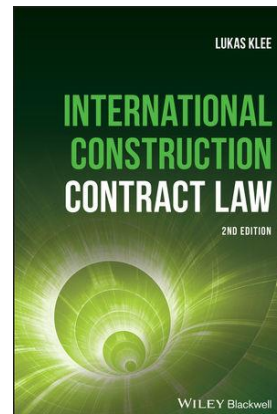
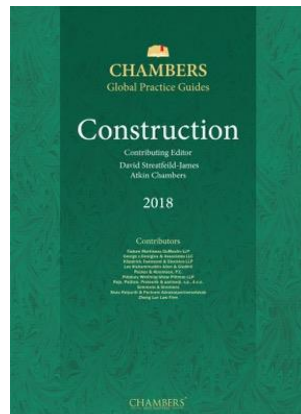
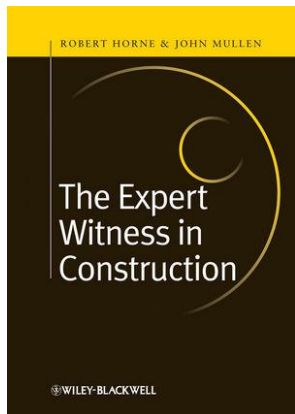
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