

Panama City, 4 October 2018 – Post-Conference Workshop
Introduction of the FIDIC Suite of Contracts
(2017 Editions)

Presented by Zoltán Záhonyi

chair, FIDIC Contracts Committee, FIDIC Accredited International Trainer

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Session 1 [13:40 – 15:00]

- ❖ The backgrounds and inputs for the updates
- ❖ New / improved features in the 2017 updates, including extended set of definitions
- ❖ Improved clarity and certainty in the 2017 updates
- ❖ New Claims and Disputes procedures
- ❖ Questions and Answers

Coffee / Tea Break [15:00 – 15:15]

Session 2 [15:15 – 16:15]

- ❖ The Engineer and the Engineer's Representative
- ❖ Engineer's Instructions
- ❖ Agreement or Determination
- ❖ General design obligations and Contractor's Documents
- ❖ Commencement and Time for Completion
- ❖ Programme
- ❖ Advance warning and EOT
- ❖ Restructured limitation of liability and Parties' risks and responsibilities
- ❖ Questions and Answers

Session 3 [16:15 – 17:10]

- ❖ 'Claims' vs. 'claims'
- ❖ Employer's & Contractor's Claims
- ❖ Claims for payment and/or EOT – the updated procedures
- ❖ Avoidance of Disputes
- ❖ The Updated Disputes Provisions
- ❖ Closing Questions and Answers, End of Workshop

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Session 1

Introduction of the FIDIC Suite of Contracts (2017 Editions)

Presented by **Zoltán Záhonyi**
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Zoltán Záhonyi introduction

- MSc. Civil Engineer (Technical University of Budapest, 1991)
- Postgraduate in Law (ELTE Budapest, 2004)
- Tunnel engineering in Germany (deputy site manager, construction)
- 1 year in the UK as environmental geotechnical engineer
- Preparation and management of hundreds of EU co-financed projects
- Consulting engineer, advising the parties to various (mainly FIDIC based) construction contracts
- Registered dispute adjudicator, (AHCEA, Hungary)
- Translator of nearly all major FIDIC Conditions of Contract (Hungarian)
- Member of a number of FIDIC Task Groups for preparing various FIDIC conditions of contracts (Subcontracts and Updates of the 1999 forms)
- Member of FIDIC Contract Committee, chair to the CC from Sept. 2015
- Accredited FIDIC International Trainer

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The Contents of Session 1

- ▶ The backgrounds and inputs for the updates
- ▶ New / improved features in the 2017 updates, including extended set of definitions
- ▶ Improved clarity and certainty in the 2017 updates
- ▶ New Claims and Disputes procedures
- ▶ Questions and Answers

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1. The backgrounds and inputs for the updates

The Basic Principles:

- **by engineers for engineers**
but: a legal document → also used by **lawyers!**
- enhance **project management** 'tools'/mechanisms
- reinforce the role of **the Engineer**
- **balanced** risk allocation → more equality between the Parties
- reflect current international **best practice**
- address **issues/comments raised by Users**
- incorporate **most recent developments** in FIDIC contracts

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1. The backgrounds and inputs for the updates

Sources for the Update

Diagram illustrating the sources for the update:

- UTG 6 Terms of Reference (as issued by the FIDIC CC)
- FIDIC Conditions of Contract for Design, Build and Operate Projects, 1st Edition 2008
- Special Advisors' proposed update items
- Contract Users' feedback
- FIDIC Conditions of Contract for Construction MDB Harmonised Edition [2010]

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2. New / improved features in the 2017 updates

- New definitions** (e.g. NOD, Notice, Exceptional Event, Claim, Dispute etc.)
- Improved Project Management Mechanisms** (e.g. contemporary records to be kept by both Parties, detailed requirements for Contractor's Programme, advance warning requirements etc.)
- Engineer's role reinforced** (e.g. actions related to rendering determinations became more structured, with securing Engineer's neutral attitude, express right is given to review and give feedback to designs, programs etc.)
- Balanced risk sharing reinforced** (e.g. confidentiality, Employer's Claims, Performance Security, Notice to correct, Limitation of Liability etc.)
- Enhanced claims and disputes procedures** (e.g. now in separate Clause – 20 and 21; clear step-by-step procedures for handling Claims and Disputes, Time Bar «- DAB's power to review, new function for DAB: Dispute prevention etc.)

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2. New / improved features in the 2017 updates

- More definitions – More Certainty
 - "Claim"
 - "Dispute"
 - "Date of Completion"
 - "Notice" Etc.
 - Alphabetical seq. !
- More balance – easier to identify and follow procedures
 - No difference in "what to do?" (Contractor vs. Employer)
 - CI 20 Employer's and Contractor's Claims
- More structured procedures – Less chance to misinterpret
 - "Step by step" procedures
 - E.g. S-CI 3.7 Agreement or Determination
- More definite time limits – BUT not Time Bars!
 - If a Party fails to comply with a time limit » consequence (BUT not a loss of right) "keep the ball rolling" ...
 - Possibility to challenge missing of the Time Bar for Notice of Claims

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2. New / improved features in the 2017 updates

- Claims & Disputes got separated – Easier to follow and apply properly
 - To make it clear, these are NOT the same! » clearer for users!
- New function for the DAAB – Dispute avoidance
 - Dispute Avoidance/Adjudication Board » to assist the Parties to avoid Disputes!
- Engineer's position strengthened – "Safe space" (S-CI 3.7)
 - When procedures started by the Engineer neither the Employer, nor the DAAB may interfere!
- Many more enhanced features → Users find more help and flexibility
 - For each stakeholder easier to
 - follow what to do
 - identify breaches
 - apply consequences.
 - Easier to manage projects + Less Disputes !

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2. New / improved features in the 2017 updates

- » In alphabetical order,
- » Abbreviations introduced » DAAB, DNP, EOT, JV, IPC, FPC
- » New definitions

Cost Plus Profit
Extension of Time
Date of Completion
Defects Notification Period
Dispute Avoidance and Adjudication Board
No-objection Joint Venture Etc.

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2. New / improved features in the 2017 updates

Definitions:

- Claim [DIFFERENT from Dispute, 3.7, CI 20]
- Cost Plus Profit [Contract Data – can be inserted, if not, 5%]
- Date of Completion [Def of Defects Notification Period, 8.8, 14.10, 17.1]
- Delay Damages [8.8, 10.2, CI 15]
- Dispute [CI 21, 3.7, 14.12]
- Dispute Avoidance and Adjudication Board [CI 21]
- Extension of Time [8.5]
- Joint Venture [1.14, 1.6]
- JV Undertaking [1.1.47]
- Key Personnel [6.12]
- No-objection [1.1.55]
- Notice [1.3]
- Notice of Dissatisfaction [3.7, 21.4]
- Part [10.2]
- Programme [8.3, 2.1, 4.20]
- Review [4.9, 5.2]

» New definitions

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2. New / improved features in the 2017 updates

Sub-Clause 1.2 [Interpretation]: "may" vs. "shall" + "consent"

Optional (=NOT compulsory) ↑
Obligation (= compulsory) ↑
Agrees to, or gives permission for ↑

New Sub-Clauses to improve the Parties collaboration:

- S-CI 3.8 [Meetings]
- S-CI 8.4 [Advance Warning]
- S-CI 21.3 [Avoidance of Disputes]

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2. New / improved features in the 2017 updates

→ Promoting Collaboration and Reciprocity Between the Parties

- S-CI 1.12 [Confidentiality]
- S-CI 1.13 [Compliance with Laws]
- S-CI 6.3 [Recruitment of Persons]
- S-CI 13.6 [Adjustment for Changes in Laws]
- S-CI 16.2 [Termination by Contractor]
- Clause 20 [Employer's and Contractor's Claims]

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3. Improved clarity and certainty in the 2017 updates

For Red Book Clause 12 [Measurement and Valuation]

S-CI 12.1 [Works to be Measured]: No agreement reached (re the measurement)
→ S-CI 3.7 [Agreement or Determination] to follow.

S-CI 12.2 [Method of Measurement]: → shall be stated in the Contract Data.

S-CI 12.3 [Valuation of the Works]: if appropriate rate or price is not agreed
→ S-CI 3.7 [Agreement or Determination] to follow.

S-CI 12.4 [Omissions]: any cost no longer recoverable → to be included in the Contractor's proposal (see S-CI 13.3 [Variation by Instruction]).

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Variations: S-CI 13.3 [Variation Procedure]:

13.3.1 [Variation by Instruction]: Contractor to submit a Proposal, Engineer to proceed under S-CI 3.7 [Agreement or Determination]

13.3.2 [Variation by request for Proposal]: Contractor to submit a Proposal or reasons (if he/she cannot comply) → Engineer to proceed under S-CI 3.7 [Agreement or Determination]

Advance Payment: S-CI 14.2 «- more structured (hence easier to follow):

14.2.1 [Advance Payment Guarantee]
14.2.2 [Advance Payment Certificate]
14.2.3 [Repayment of Advance Payment]

➔ A logical sequence is followed

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Issuing Interim Payment Certificates S-CI 14.6:

14.6.1 The IPC: the amount, that "the Engineer fairly considers to be due"

14.6.2 Withholding (amounts in) an IPC: Engineer to give Notice and "detail his/her calculation of the amount and state the reasons for it being withheld".

14.6.3 Correction or modification:
– Engineer can correct /modify previous IPC
– Contractor can identify amount(s) not certified, but to which he/she considers entitled → Engineer to correct in the next IPC
– Contractor not satisfied with an IPC → Engineer to proceed in accordance with S-CI 3.7 [Agreement or Determination]

Payment S-CI 14.7:
Times for payment to be inserted in the Contract Data (advance-, interim-, and final) «- if not, default periods are stated in S-CI 14.7.

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Care of the Works Clause 17 [Care of the Works and Indemnities]:

Limitation of liability: **1999** [S-CI 17.6] → **2017** [S-CI 1.15] Contractor's "fit for purpose" indemnity has not become part of the limitation!

2017 Edition	1999 Edition
S-CI 17.1 [Responsibility for Care of the Works]	S-CI 17.2 [Contractor's Care of the Works]
S-CI 17.2 [Liability for Care of the Works]	Sets out clearly the Contractor's liability and consequences of rectification of loss and/or damage.
S-CI 17.3 [Intellectual and Industrial Property Rights]	S-CI 17.5 [Intellectual and Industrial Property Rights]
S-CI 17.4 [Indemnities by Contractor]	First para in S-CI 17.1 [Indemnities] + for Contractor's Design: indemnity for Works not being fit for purpose.
S-CI 17.5 [Indemnities by Employer]	Second para in S-CI 17.1 [Indemnities].
S-CI 17.6 [Shared Indemnities]	
Each Party's liability to indemnify the other Party to be reduced proportionately.	

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Insurance Clause 19:

S-CI 19.1 [General Requirements]:
Similar provisions as in the 1999 Edition, but shared liability included: loss proportionate to each Party's liability under Clause 17 or 18.

S-CI 19.2 [Insurance to be Provided by the Contractor] «- Clearer structure and requirements:

19.2.1 Insurance for the Works
19.2.2 Insurance for the Contractor's Equipment
19.2.3 Insurance for „Liability for breach of professional duty“ (=professional indemnity) – includes fitness for purpose ONLY if stated in the Contract Data
19.2.4 Insurance for injury of persons and damage to property (3rd party liability)
19.2.5 Insurance for injury to employees (=Employer's liability)
19.2.6 Other insurances required by law/local practice.

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Unforeseeable Physical Conditions

In case of the  no (significant) change: the 2017 edition does not include any compensation for the Contractor.

In case of the  : the 2017 edition added a systematic & structured feature to make it clearer, what procedures to follow:

Intro. → 4.12.1 → 4.12.2 → 4.12.3 → 4.12.4 → 4.12.5

Setting the scope & definition → Engineer's inspection & investigation → Delay and/or Cost → Agreement or Determination...

Contractor's Notice → Engineer's Instructions

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Unforeseeable Physical Conditions

Now in the 2017 edition it became clearer, what are the stakeholders' obligations and what procedures they are required to follow:

For the Contractor:	For the Engineer:	For All:
<ul style="list-style-type: none"> » Give immediate Notice, » Allow Engineer to inspect, » Describe the conditions, » Give reasons WHY "Unforeseeable", » Describe adverse effects, » Continue & take measures, » Comply with Eng. Instructions, » Treat his/her Claim (if any). 	<ul style="list-style-type: none"> » Inspect & investigate (7 days or as agreed), » Give instruction (if found necessary) 	<ul style="list-style-type: none"> » Follow procedures for agreement or determination regarding delay and/or Cost [S-CI 20.2 and 3.7]

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3. Improved clarity and certainty in the 2017 updates

Performance Security

There are no "revolutionary" changes in the 2017 edition in comparison with the 1999 forms – except **three new features** (see next slide), and the three books are identical regarding Sub-Clause 4.2.

Improvements include, that the 2017 edition added a systematic & structured approach to make it clearer, what procedures and provisions are included:

Intro.	4.2.1	4.2.2	4.2.3
Sets the basic obligation + warns: this is a FALLBACK Sub-Clause	Contractor's obligations	Claims under the Performance Security	Return of the Performance Security

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3. Improved clarity and certainty in the 2017 updates

Performance Security

NEW FEATURE 1: In case of a Variation, if the Contract Price is changed by more than 20%, the Performance Security may be adjusted (increased or decreased) accordingly [= **more flexibility, more financial balance**].

NEW FEATURE 2: The Employer may make a claim on the Performance Security in case the Contractor removes a defective Plant from the Site for repair, but fails to return, reinstall & retest it [= **additional protection for the Employer**].

NEW FEATURE 3: Any amount which is received by the Employer under the Performance Security shall be taken into account upon Final Payment and in case the Contract is terminated [= **improved clarity**].

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3. Improved clarity and certainty in the 2017 updates

Key Personnel

"Key Personnel" became defined [= the positions (if any) of the Contractor's Personnel, other than the Contractor's Representative, that are stated in the Specification.]

Sub-Clause 6.12 ← a fall-back S-C!! [Key Personnel to be stated in the Specification!]

Related provisions:

- Natural persons, to be named in the Tender.
- Contractor shall submit to the Engineer for consent the name and particulars.
- Engineer's objection (if any) shall be within 14 days (otherwise consent is deemed to be given).
- Revoking or replacement – only with the Engineer's prior consent.
- All Key Personnel shall be
 - based at the Site and
 - fluent in the language for communications defined.

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3. Improved clarity and certainty in the 2017 updates

Variations

Variations in the 2017 edition books are treated differently only to the extent that the books are "design-build" based, meanwhile the book includes **construction** (with limited design only).

The basic structure of the relevant Sub-Clauses has not been changed, but clarity of procedures was improved by splitting S-CI 13.3:

13.1 Right to Vary	13.2 Value Engineering	13.3 Variation Procedure
		→ 13.3.1 Variation by Instruction
		→ 13.3.2 Variation by Request for Proposal

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3. Improved clarity and certainty in the 2017 updates

Variations

NEW FEATURE: If the Engineer does NOT consent a variation proposal (previously requested), then the Contractor becomes entitled to recover his Cost incurred when preparing the proposal [= **more protection for the Contractor**].

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 [All the 3 books]
- 8.12 – prolonged suspension (if works are omitted) [All the 3 books]
- 11.4 – Contractor's failure to remedy (if works are omitted) [All the 3 books]
- 17.2 – Contractor's rectification of a damage [All the 3 books]

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3. Improved clarity and certainty in the 2017 updates

Claims

No revolutionary changes occurred in the 2nd Editions in comparison with the basic concept in the 1999 Forms, however a few additional features, more clarity and improving the contractual balance are included.

For the sake of **clarity**:

- "Claims" and "Disputes" became more distinct [Clause 20 and Clause 21];
- "Claims" and "claims" became distinguished;
- interim (fully) detailed Claims to be assessed and certified for payment.

For the sake of **balance**:

- Employer's Claims are moved to be dealt with equally (as Contractor's Claims);
- Both the Employer and the Contractor are referred as "claiming Party" – hence, procedures became uniform.

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3. Improved clarity and certainty in the 2017 updates

Claims

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

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3. Improved clarity and certainty in the 2017 updates

Claims

More time limits added – goals: channel procedures and avoid dead-end procedures.

Time Limit	Consequence if not met	Possible cure Y/N
Notice [20.2.1]: 28 d	Entitlement(s) lost	Yes [20.2.2]
Initial response [20.2.2]: 14 d	Deemed validity of Claim Notice	Yes [20.2.4 & 20.2.5]
A statement, within a fully detailed Claim [20.2.4 (b)]: 84 d	Notice of Claim deemed lapsed	Yes [20.2.4 & 20.2.5]
Notice of expiry [20.2.4]: 14 d	Deemed validity of Claim Notice	Yes [20.2.4 & 20.2.5]
Agreement or Determination [3.7]: 37 d + 42 d	Deemed rejection of the Claim	Yes [21.4]
Notice of Dissatisf. [3.7.5]: 28 d	Determination is deemed accepted	NO [BUT: 21.6]

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3. Improved clarity and certainty in the 2017 updates

The Increased Significance of Notices in the Updates

"Notice" means a written communication identified as a Notice and issued in accordance with Sub-Clause 1.3 [Notices and Other Communications].

Serving Notice is / may be necessary under the following Sub-Clauses:

1.5; 1.8; 1.9	2.4; 2.5	3.1; 3.3; 3.4; 3.5; 3.6; 3.7	6.5; 6.12	8.1; 8.3; 8.7; 8.12
4.3; 4.4; 4.5; 4.7; 4.9; 4.12; 4.16; 4.17; 4.21; 4.23	5.2; 5.4; 5.8	7.3; 7.4; 7.5		
9.1; 9.2	10.1; 10.2; 10.3	11.1; 11.2; 11.4; 11.5; 11.6; 11.7; 11.8	12.1; 12.4	
13.1; 13.2; 13.3; 13.4; 13.6	14.6; 14.11	15.1; 15.2; 15.5	16.1; 16.2	17.2; 17.3
18.2; 18.3; 18.5; 18.6	20.1; 20.2	21.4		

These non-exhaustive references to Sub-Clauses are based on the 2017 2nd ed. YB

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3. Improved clarity and certainty in the 2017 updates

The Increased Significance of Notices in the Updates

There are altogether some **68 Sub-Clauses** (in the), that require serving of "Notice".

Within this 68, **21 Sub-Clauses** include *multiple* "Notice" obligations.

There are **3 types** of circumstances/scenarios, how these Notices are served:

- Unconditional «- the Notice must be served *as per Contract*
- Conditional «- the Notice must be served *as per circumstance*
- Optional «- the Notice must be served after an *optional decision*

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3. Improved clarity and certainty in the 2017 updates

The Increased Significance of Notices in the Updates

Example for an **unconditional Notice**: **Est. occurrences: 14**
Sub-Clause 8.1: The Engineer shall give a Notice to the Contractor stating the Commencement Date...

Example for a **conditional Notice**: **Est. occurrences: 43**
Sub-Clause 1.9: If the Contractor finds an error, fault or defect in the Employer's Requirements... shall give a Notice to the Engineer...

Example for a **Notice after an optional decision**: **Est. occurrences: 40**
Sub-Clause 3.6: If the Employer intends to replace the Engineer... shall give a Notice to the Contractor...

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The Increased Significance of Notices in the Updates

To what extent these "Notice" obligations are new or additional to the similar requirements included in the 1999 Yellow Book?

14%
69%
17%

of these "Notices" in the 2017

Are included in the 1999 Ed. YB as "procedures" but without notice requirement.
Are the same in the 1999 Ed. YB, but only "capitalised" ["Notice"]
Have NO "predecessors" in the 1999 Ed. YB, hence, NEW.

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4. New Claims and Disputes procedures

"Claim" as a new definition [1.1.5]: ...a request for an **entitlement** or **relief** (NOT JUST EOT + additional payment!)

EMPLOYER	CONTRACTOR
– Extension of DNP	– EOT
– Payment of cost	– Payment of Cost OR
	– Payment of Cost + Profit

Claim:

For other entitlement / relief (-> last para of S-CI 20.1)
– see Engineer's certificate, determination etc.
– but NOT additional payment / EOT and either 3rd party claims!

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4. New Claims and Disputes procedures

Claims procedures became *balanced* and more *structured* S-CI 20.2 [Claims for Payment and/or EOT]:

20.2.1 Notice of Claim: wording like 1999 Edition S-CI 20.1 paras 1-2, BUT „claiming Party“

20.2.2 Engineer's initial response: within 14 days if the Claim is time barred (reasons!). Lack of Notice: **deemed valid!**

20.2.3 Contemporary Records: "...records that are prepared or generated at the same time, or immediately after, the event or circumstance giving rise to the Claim." «- see 4th para of S-CI 20.1 in the 1999 Edition.

20.2.4 Fully detailed Claim: (facts, legal basis, records, quantum) «- within 84 days after the event / circumstance (or agreed with the Engineer). «- if this time limit is not complied with -> deemed consequences (see Session 8 for the details).

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4. New Claims and Disputes procedures

S-CI 20.2 [Claims for Payment and/or EOT] (continued):

20.2.5 Agreement or determination of the Claim: Engineer's action in accordance with S-CI 3.7 [Agreement or Determination] «- similar process as in case of S-CI 3.5 in the 1999 Edition, BUT time bar can be waived.

20.2.6 Claims of continuing effect: similar / identical procedures apply as in case of S-CI 20.1 in the 1999 Edition, but time limits can be agreed with the Engineer differently, otherwise S-CI 20.2.5 applies.

20.2.7 General Requirements: Engineer shall include agreed or determined amount in the forthcoming IPC, Employer becomes entitled to set off / deduct only by complying S-CI 20.2. Same provisions apply as in last para of S-CI 20.1 in the 1999 Edition.

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4. New Claims and Disputes procedures

Focus on Dispute Avoidance and Management

The major changes in the 2017 Editions (*summary*):

- » DAAB in the 2017 Editions (new feature of "avoidance" is added «-» DAB in the 1999 Editions).
- » Disputes became separated: in a new additional Clause 21 (aim to distinguish clearly).
- » Standing DAAB for ALL the three forms (previously: Yellow and Silver Book: ad-hoc DAB).
- » "Dispute" and "DAAB" became defined.
- » The Dispute [Clause 21] became more structured.

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Questions – Answers

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Session 2
Introduction of the FIDIC Suite of Contracts (2017 Editions)

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The Contents of Session 2

- ▶ The Engineer and the Engineer's Representative
- ▶ Engineer's Instructions
- ▶ Agreement or Determination
- ▶ General design obligations and Contractor's Documents
- ▶ Commencement and Time for Completion
- ▶ Programme
- ▶ Advance warning and EOT
- ▶ Restructured limitation of liability and Parties' risks and responsibilities
- ▶ Questions and Answers

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1. The Engineer and the Engineer's Representative

Employer → Appointment → **Engineer**

Authorities (see S-CI 3.2)

Duties (see S-CI 3.2):
"As assigned in the Contract"

Requirements:

- a professional engineer having suitable qualifications, experience and competence AND
- shall be fluent in the ruling language (!)

Replacement: 42 days Notice, if no response from the Contractor within 14 days – **deemed acceptance!**

If a legal entity:
A "natural person" to be appointed → **NOTICE** to the Parties (also, if revoked!)

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1. The Engineer and the Engineer's Representative

The Engineer shall:

- carry out duties or exercising authority, specified in or implied by the Contract;
- act as a skilled professional;
- be deemed to act for the Employer.

BUT ~~Amending the Contract~~
Relieving any of the parties any duty, obligation or responsibility under or in connection with the Contract.

Except as otherwise stated in the CoC

Necessary to obtain the consent of the Employer before exercising a specified Authority? → **Particular Conditions**

EXCEPT: Engineer's authorities under S-CI 3.7 [Agreement or Determination]
+ The Employer shall **not** impose **further constraints** on the Engineer's authority.

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1. The Engineer and the Engineer's Representative

The Engineer's option: to appoint an **"Engineer's Representative"** ← authority can be delegated under S-CI 3.4 [Delegation by the Engineer]

Acting on behalf of the Engineer at the Site (except replacement).

- same qualifications/requirements apply as to the "Engineer".
- shall be based at the Site for the whole time that the Works are being executed at the Site. ← if absent, replacement to be appointed by the Engineer!

The Engineer may also delegate duties and authorities to **"assistants"**, **except**

- under S-CI 3.7 [Agreement or Determination] and
- under S-CI 15.1 [Notice to Correct]

Similar rules apply as for the "Engineer's Representative", Detailed provisions included under S-CI 3.4 [Delegation by the Engineer]

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2. Engineer's Instructions

Engineer → Instructions → **Contractor**

...shall only take instructions from

- the Engineer, or
- the Engineer's representative, or
- an assistant ← with proper delegation!

as may be necessary for the execution of the Works, in accordance with the Contract.

Contractor shall comply! ?

- Variation?
- Not in compliance with applicable Laws?
- Will it reduce the safety of the Works?
- Is it technically impossible?

Notice + reasons → **Engineer**

Immediately and BEFORE commencing implementation

Engineer's response

- Confirming
- Revising
- Varying

BUT: No response within 7 days = revoking!

Otherwise, **Contractor be bound!**

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3. Agreement or Determination

In comparison with the 1999 Red/Yellow Book, there is **no change in the basic concept** in this S-Cl. **BUT**: – it became **more structured**,
– Time limits and **deemed consequences** added in order to avoid deadlock situations.

An important requirement for the Engineer:
"...the Engineer shall act *neutrally* between the Parties and shall not be deemed to act for the Employer."

„Any matter or Claim” shall be treated in accordance with this Sub-Clause.

The steps of procedures:

- 3.7.1 Consultation to reach Agreement
- 3.7.2 Engineer's Determination
- 3.7.3 Time limits
- 3.7.4 Effect of the agreement or determination
- 3.7.5 Dissatisfaction with Engineer's determination

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3. Agreement or Determination

3.7.1 Consultation to reach Agreement

Has the Agreement been reached?

- YES → Notice of the Parties' Agreement
- NO → Proceed with 3.7.2

3.7.3 Time limits apply all over these procedures!

The Parties may also decide to **expedite process** giving an early Notice to the Engineer, that they cannot agree, so **3.7.2 to follow!**

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3. Agreement or Determination

3.7.2 Engineer's Determination

Engineer to make a „FAIR” determination.

- in accordance with the **Contract**, and
- taking due regard of all *relevant* circumstances.

Notice of the Engineer's Determination shall

- be given **within time limit** set in 3.7.3
- **include details** with reasons and detailed supporting particulars.

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3. Agreement or Determination

3.7.3 Time limits

Engineer's Notice of agreement

- within 42 days or
- as otherwise proposed by the Engineer AND agreed by the Parties

START of the time limit:

- ◆ As stated in case of the relevant S-Cl (non-claim type procedures)
- ◆ When the Notice is received by the Engineer („other entitlement or relief”)
- ◆ When the (final) full details of a Claim received by the Engineer.

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3. Agreement or Determination

3.7.3 Time limits

Engineer's Notice of determination

- within 42 days or
- as otherwise proposed by the Engineer AND agreed by the Parties

START of the time limit:

- ◆ After the date corresponding to his/her obligation to proceed under the last paragraph of Sub-Clause 3.7.1

If the Engineer does not meet these time limits:

- **Deemed rejection** (in case of a Claim)
- **Dispute** (in case of a matter/non-claim)

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3. Agreement or Determination

3.7.4 Effect of the agreement or determination

Each agreement or determination → **BINDING** → both Parties

Unless and until → Corrected, or Dispute decision overturns

shall be complied with by the Engineer

If an **error** is found in the Determination: **Engineer to correct** within 7 days

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3. Agreement or Determination

3.7.5 Dissatisfaction with Engineer's determination

Either Party may serve a "Notice of Dissatisfaction" [NOD]

Time limit: **28 days** of the Engineer's release of the Determination. (Or deemed rejection)

Procedural steps to be followed / observed!

No NOD is given: determination is deemed to be accepted → **FINAL & BINDING**. **DAAB Procedure may begin**

Only parts of an Engineer's Determination may be subject to NOD.
In case of a Party's non-compliance with the Engineer's determination: → **enforcement through Arbitration!**

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4. General design obligations and Contractor's Documents

5.2.2 Review by Engineer

Terminology defined in the Sub-Clause:

"Review Period": 21 days from Engineer's receipt (ER might state a different period)

"Contractor's Document": NOTHING beyond the docs specified in the Employer's Requirements or in the Conditions of Contract as being required to be submitted for Review.

"Contractor's Notice": Contractor's declaration re the document submitted, about readiness for Review and compliance with the ER (or otherwise – exact explanation to be given!).

Engineer's feedback (Notice):

- "No objection" (except minor issues to correct), OR
- "Rejection" (non-compliance with the ER or the Conditions – with EXACT reasons given(!))
- Silence (no Notice within 21 days) = **Notice of No-objection!**

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4. General design obligations and Contractor's Documents

Engineer's instruction:

Further Contractor's Documents are reasonably required to demonstrate that the Contractor's design complies with the Contract.

Contractor to prepare and submit (no financial compensation!)

In case of receiving Engineer's rejection the Contractor:

- shall revise the Contractor's Document
- re-submit (a new Review Period starts!)
- No entitlement (EOT, additional payment excluded).

If the Employer incurs additional costs as a result of such resubmission and subsequent Review:
→ **Employer's Claim against the Contractor** (subject to S-CI 20.2).

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5. Commencement and Time for Completion

The Difference!

Commencement Date

max. 42 days

min. 14 days

Contractor's receipt of the Letter of Acceptance OR the date of signing the Contract Agreement

Engineer's notice of the Commencement Date

Time for Completion

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6. Programme

Initial programme / revised programme

Receipt of Notice to Commence

CONTRACTOR

max. 28 days

ENGINEER

Initial programme

Revised programme (when necessary)

One paper* + one electronic copy
Using software indicated in the ER (or acceptable to the Engineer)
Compliant with items (a) – (k) in S-C 8.3

to review,
may give Notice of non-compliance
max. 21 d for the initial
max. 14 d for the revised

NO Engineer's Notice within such time limits: "deemed No-objection!"

The "Programme"

* Additional paper copies may be required in the Contract Data!

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6. Programme

Initial programme / revised programme – required to include:

- Commencement Date + Time for Completion (Sections!)
- Date(s) of access + possession of (each part of) Site
- The order of carrying out the Works (incl. stages)
- Review periods
- Sequence & timing of tests and inspections
- All activities logically linked (inc. critical path!)
- Dates of rest and holidays (local)
- Key delivery dates (Plant & Materials)
- Actual progress and delays to the date of the revised programme

+ A supporting Report, including:

- Description of the major stages of execution
- General description of the methods
- Manpower and equipment resourcing
- Identification of any major changes (in the Programme)
- Proposals to overcome the effects of any delay(s)

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6. Programme

Further aspects / requirements:

The „Programme”

- The Contractor shall proceed in accordance...
- The Employer's Personnel shall be entitled to rely on...
- No relieve for the Contractor from any obligation to give a Notice!

If, at any time, the **Engineer gives a Notice** to the Contractor that

- the Programme fails (to the extent stated) to comply with the Contract or
- ceases to reflect actual progress or
- is otherwise inconsistent with the Contractor's obligations...

...the Contractor shall **within 14 days** after receiving this Notice submit a revised programme to the Engineer.

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7. Advance warning and EOT

Request to the Contractor to submit a proposal [13.3.2] to avoid or minimise the effects of such event(s) or circumstance(s).

- adversely affect the work of Contractor's Personnel
- increase the Contract Price
- delay the execution of the Works or a Section (if any)

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8. Restructured limitation of liability and Parties' risks & responsibilities

The "Limitation of Liability" Sub-Clause was changed in the Updates in 3 ways:

Location:	Structure:	Substance:
This S-CI was relocated to be at the front of the Conditions: emphasizing its importance and general applicability to provisions other than those enumerated in S-CI 17.6 (used to be S-CI 17.6 now 1.15)	It used to be 3 paragraphs but now it includes clear listings indicating exemptions under the Conditions: - Where this limitation S-CI does not apply, and - Where the Contractor's total liability limit does not apply.	These limitations mentioned are more accurate (as they include all the affected Sub-Clauses), clearer and in compliance with the relevant conditions (especially under Clauses 17 and 19).

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8. Restructured limitation of liability and Parties' risks & responsibilities

As far as indemnities are treated, the 2017 2nd Editions became **much clearer and detailed**, in comparison with their predecessors.

Sub-Clause 17.1 Indemnities
ONE Sub-Clause only, covering both Employer's and Contractor's indemnities in a generic manner

More accurate and detailed provisions, divided by parties and beyond, introduced in 3 Sub-Clauses:
S-CI 17.4 Indemnities by Contractor
S-CI 17.5 Indemnities by Employer
S-CI 17.6 Shared Indemnities

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8. Restructured limitation of liability and Parties' risks & responsibilities

From the 1999 Edition, a wrong reference to Employer's Risks could mislead users about Contractor's liability for anything beyond Employer's risks.
→ **NOW this has become clear and fixed** (such wrong interpretation was eliminated).

The logical sequence in Clause 17 now has:

- S-CI 17.1 Responsibility for Care of the Works
- S-CI 17.2 Liability for Care of the Works
- ...
- S-CI 17.4 Indemnities by Contractor
- S-CI 17.5 Indemnities by Employer
- S-CI 17.6 Shared Indemnities

This S-CI now accurately describes the Contractor's liabilities.

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8. Restructured limitation of liability and Parties' risks & responsibilities

'Force Majeure' -> Exceptional Risks

The previously inaccurate titles and sequence of Clauses in the 1999 Forms:

CI 17 Risk and Responsibility	CI 17 Care of the Works and Indemnities
CI 18 Insurance	CI 18 Exceptional Events
CI 19 Force Majeure	CI 19 Insurance

...was corrected to give them proper meaning and to appear in the right logical sequence in the 2017 Updates.

The change in terminology ("Force Majeure" [1999] → "Exceptional Events" [2017]) helps users avoiding possible conflict with local law.

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8. Restructured limitation of liability and Parties' risks & responsibilities

'Force Majeure' -> Exceptional Risks

Some **changes** to observe:

- ▶ Sub-Clause 19.5 of the 1999 Form: "Force Majeure Affecting Sub-contractor" was eliminated.
- ▶ The definition of "Exceptional Events" in S-CI 18.1 of the 2017 Form has not changed significantly, but became more accurate (e.g. "strike and lockout" became separated as an individual item in the list, "tsunami" is added etc.).
- ▶ Notifying Exceptional Event within 14 days (S-CI 18.2) is not a time bar, but the affected Party will not be excused of performing prevented obligations until the other Party receives this Notice.
- ▶ Continuing effect of Exceptional Event is now included (S-CI 18.3), as well as Parties' obligations at the end of the Exceptional Event became clearer and reciprocated.
- ▶ Regarding "Optional Termination" and "Release from Performance under the Law" no material change was made, but the provisions are now clearer and better structured.

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Questions – Answers



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Session 3

Panama City, 4 October 2018 – Post-Conference Workshop

Introduction of the FIDIC Suite of Contracts (2017 Editions)

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The Contents of Session 3

- ▶ 'Claims' vs. 'claims'
- ▶ Employer's & Contractor's Claims
- ▶ Claims for payment and/or EOT – the updated procedures
- ▶ Avoidance of Disputes
- ▶ The Updated Disputes Provisions
- ▶ Questions and Answers

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1. 'Claims' vs. 'claims'

1.1.5 "Claim" means a **request or assertion** by one Party to the other Party for an **entitlement or relief** under any Clause of these Conditions or otherwise in connection with, or arising out of, the Contract or the execution of the Works.

"claim" – anything beyond, e.g.

- Employer's claim under the Performance Security
- Employer's claim under the Advance Payment Guarantee
- Third party claims

Any additional payment from the Contractor
 Any additional payment from the Employer
 Extension of Defects Notification Period
 Extension of Time for Completion (EOT)

Another entitlement or relief (certificate, determination, instruction, Notice, opinion or valuation of the Engineer).

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2. Employer's & Contractor's Claims

The 2017 Editions now distinguish: **Claims for MONEY and/or TIME** and **Claims for other entitlements**

See sub-para (a) and (b) in S-CI 20.1
 See sub-para (c) in S-CI 20.1

Procedures related to MONEY and/or TIME Claims are detailed under Sub-Clause 20.2 [Claims For Payment and/or EOT]
 Procedures for Claims for other entitlements are included in the last paragraph of S-CI 20.1 [Claims] only.

A Party requests an entitlement or relief
 The other Party / Engineer does not agree with the request

Claiming Party → Notice → Engineer

ASAP
 Details of the Case
 Other Party's / Engineer's Disagreement

To proceed in accordance with S-CI 3.7.

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2. Employer's & Contractor's Claims

Procedures related to MONEY and/or TIME Claims are detailed under Sub-Clause 20.2 [Claims For Payment and/or EOT].

The structure of this S-CI follows the **logical sequence** of dealing with claims by the Parties and the Engineer:

- 20.2.1 Notice of Claim
- 20.2.2 Engineer's initial response
- 20.2.3 Contemporary records
- 20.2.4 Fully detailed Claim
- 20.2.5 Agreement or determination of the Claim
- 20.2.6 Claims of continuing effect
- 20.2.7 General requirements

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3. Claims for payment and/or EOT – the updated procedures

20.2.1 Notice of Claim

The wording of this part serves the same functions as the first two paras in the 1999 Edition S-CI 20.1. The obvious **differences** and new features to observe:

- "claiming Party" (not just the Contractor)
- "Notice of Claim" identified (for later reference)
- The whole 2nd paragraph is made to be **universal** (applies both the Contractor and the Employer for all their money and time claims.)

BEWARE: "...as soon as practicable..." !

MAX. 28 days!

Time bar

The claiming Party becomes aware or should have become aware of the event or circumstance.

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3. Claims for payment and/or EOT – the updated procedures

20.2.2 Engineer's initial response

This is a NEW feature in the 2017 Editions! ← The AIM: not allowing procedures going ahead if the Notice of Claim is time barred (=saving time and efforts).

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3. Claims for payment and/or EOT – the updated procedures

20.2.3 Contemporary records

It is made clear what "contemporary records" mean (= records that are prepared or generated at the same time, or immediately after, the event or circumstance giving rise to the Claim).

A "balanced" obligation: The claiming Party ... shall keep such contemporary records as may be necessary to **substantiate** the Claim.

Last paragraph: obligations **ONLY for the Contractor** (as a claiming Party):

The Engineer may:

- monitor the Contractor's contemporary records;
- instruct the Contractor to keep **additional contemporary records**;

The Contractor shall:

- permit the Engineer to inspect all these records during normal working hours;
- submit copies to the Engineer (if instructed)

BUT: Such monitoring, inspection or instruction... shall not imply acceptance of the accuracy or completeness of the Contractor's contemporary records.

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3. Claims for payment and/or EOT – the updated procedures

20.2.4 Fully detailed Claim

Time limit for submission: **84 days** after the claiming Party became aware, or should have become aware, of the event or circumstance giving rise to the Claim

OR

such **other period** (if any) as may be proposed by the claiming Party and agreed by the Engineer. → **FLEXIBILITY!**

It shall include:

- a detailed **description** of the event or circumstance...
- the contractual and/or other legal **basis of the Claim**
- contemporary records**
- detailed **supporting particulars** of the amount of additional payment Claimed and/or EOT or extension of the DNP.

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3. Claims for payment and/or EOT – the updated procedures

20.2.4 Fully detailed Claim

TWO deemed consequences are included in this S-CI! → **NO STOPPAGE OF PROCEDURES!**

If within this time limit the claiming Party fails to submit the statement, the Notice of Claim shall be **deemed to have lapsed**, 1

Engineer to give a **Notice** to the claiming Party.

2 No Notice = the Claim **deemed to remain valid**.

If the claiming Party disagrees with the Engineer's Notice of late submission:

...may give reasons **in the fully detailed Claim** (circumstances **justifying** late submission).

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3. Claims for payment and/or EOT – the updated procedures

20.2.5 Agreement or determination of the Claim

Fully Detailed Claim (20.2.4) → Engineer to proceed in accordance with S-CI 3.7 **TIME**

Final Fully Detailed Claim (20.2.6) → **MONEY**

On this occasion, the Engineer to **assess circumstances/reasons** for:

- late Notice and/or
- late submission of particulars.

» whether or to what extent the other Party would be prejudiced by acceptance of the late submission

» the other Party's prior knowledge of the event or circumstance giving rise to the Claim

» any evidence of the other Party's prior knowledge of the contractual and/or other legal basis of the Claim

The Engineer may request necessary additional particulars after receiving the fully detailed Claim [conditions apply! See sub-para (i) to (iv)].

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3. Claims for payment and/or EOT – the updated procedures

20.2.6 Claims of continuing effect

Basically the same provisions apply as in the 1999 Editions

MORE CLARITY: the Engineer shall give his/her response on the contractual or other legal basis of the Claim. → **FIRST Interim Claim!**

20.2.7 General requirements

In each **Payment Certificate** the Engineer shall include such amounts for any Claim as have been reasonably substantiated

Notice of Claim → Agreement or Determination → **NEW!**

Now it is made explicit: Employer's right to deduct or set off or extension of DNP **ONLY if he/she** complied with the procedures under S-CI 20.2!

The last para is basically identical with the same in S-CI 20.1 of the 1999 Editions (BUT it became **balanced** → see: "claiming Party" !)

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4. Avoidance of Disputes

This is a substantially **new feature** for the **Yellow** and **Silver Book** conditions!
Previously, it was only the 1999 Red Book involving a "**standing DAB**", hence, enabling this function.

See: General Conditions of Dispute Adjudication Agreement,
4 General Obligations of the Member
item (k): (The Member shall...) "...be available to **give advice and opinions**, on any matter relevant to the Contract **when requested** by both the Employer and the Contractor, subject to the agreement of the Other Members (if any)."

One of the most important developments in the provisions in the 2017 editions, that **all the three contracts** include a standing DAAB, so making it possible to adopt a **NEW FUNCTION = DISPUTE AVOIDANCE!**

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4. Avoidance of Disputes

The process may be started in two ways:

* **SUBJECT:** to provide assistance and/or informally discuss and attempt to resolve any issue or disagreement.

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4. Avoidance of Disputes

TIMING: → Any time
 ↳ During any meeting,
 ↳ During any Site visit or
 ↳ Otherwise.

EXCEPT if the subject matter is in progress under S-CI 3.7 by the Engineer!
 ↳ **UNLESS the Parties agree otherwise!**

The Engineer's "niche" (territory)

- It is expected that **BOTH Parties are present** (unless they agree otherwise).
- The **Parties are not bound** to act on any advice by the DAAB (hence, the advice is NOT BINDING).
- The **DAAB shall not be bound** in any future Dispute resolution process or decision by any views or advice given.

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5. The updated dispute provisions

In summary, the **new features** in the 2017 Editions related to disputes:

- "Dispute" became defined
- New Clause [21] accommodates the dispute provisions
- Standing DAAB for all the three books
- New function is added ("avoidance" of disputes)
- Arbitration provisions received necessary update

All related documents became updated, including:

- = APPENDIX General Conditions of Dispute Avoidance/Adjudication Agreement
- = ANNEX DAAB Procedural Rules and
- = Dispute Adjudication/Avoidance Agreement

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5. The updated dispute provisions

Constitution of the DAAB (2017) ↔ **Appointment of the Dispute Adjudication Board**

Within the time limit stated in the Contract Data if not stated, then 28 days after Contractor's receipt of the Letter of Acceptance.

↔ **Not later than 28 days after a Party gave notice to the other Party of its intention to refer a dispute to the DAB.**

The member(s) shall be selected from those named in the list in the Contract Data

↔ **This provision is just as an "option".**

CLARITY added: The DAAB shall be deemed to be constituted on the date that the Parties and the member(s) of the DAAB have all signed a DAAB Agreement.

ALSO: expiry of the term of the DAAB is different, the later of:
 – the "discharge" becoming effective (or deemed...) or
 – 28 days after the DAAB has given its decision on all Disputes.
 OR, if the Contract is terminated, **the earlier** of:
 – 28 days after the DAAB has given its decision on all Disputes, or
 – the date that the Parties reach a final agreement on all matters re the termination.

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5. The updated dispute provisions

Failure to Appoint DAAB Member(s) ↔ **Failure to Agree Dispute Adjudication Board**

The provisions now became extended to cover those situations, when the Parties although have agreed the members of the DAAB, but **one of them refuses or fails to sign the tripartite agreement**. (← in this case the **appointing entity will appoint the agreed members to act as DAAB.**)

After having been appointed, the **DAAB Agreement is deemed to have been signed** by both the Parties and the Members.

↳ Including: – the **monthly services fee and daily fee** shall be as stated in the terms of the appointment; and
 – the **law governing the DAAB Agreement** shall be the governing law of the Contract.

Further new feature: **Payment of the DAAB** could be made by **ONE of the Parties** (in total), BUT half of the sum claimed from the other Party.

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5. The updated dispute provisions

Obtaining DAAB's Decision has become more structured, hence easier to understand and follow. The structure of this Sub-Clause includes the logical sequence of procedures:

- 20.4.1 Reference of a Dispute to the DAAB
- 20.4.2 The Parties' obligations after the reference
- 20.4.3 The DAAB's decision
- 20.4.4 Dissatisfaction with DAAB's decision

The process to commence a dispute resolution procedure became more detailed.

This includes: If Sub-Clause 3.7 [Agreement or Determination] applied to the subject matter of the Dispute, the referral shall be made within 42 days of giving or receiving (as the case may be) a NOD under Sub-Clause 3.7.5 [Dissatisfaction with Engineer's determination]. If the Dispute is not referred to the DAAB within this period of 42 days, such NOD shall be deemed to have lapsed and no longer be valid.

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5. The updated dispute provisions

The Parties' obligations after the reference do NOT differ from the provisions in the 1999 Editions.

Now clear: The decision is binding on both Parties + Parties shall promptly comply

Irrelevant if a Party gave a NOD with respect to the decision.

PLUS: "The Employer shall be responsible for the Engineer's compliance with the DAAB decision."

Two important provisions added (based on real life experience):

- if the DAAB decision requires payment of an amount by one Party to the other, this payment becomes immediately due without any certification or Notice (e.g. by the Engineer); and
- the DAAB may request the payee to provide an appropriate security (at the DAAB's sole discretion) in return of the amount due (in case the decision is overturned as a result of an Arbitration procedure).

The provisions related to giving notice of dissatisfaction [NOD] with the DAAB's decision are substantially the same as in the 1999 Editions, but it is now possible to express a NOD related to only specific parts of the DAAB's decision (and not just necessarily the whole decision).

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5. The updated dispute provisions

Arbitration may commence only after 28 days after the NOD was given (←→ 56 days in the 1999 Editions!)

There are two new features given to the arbitration provisions:

- In any award dealing with costs of the arbitration, the arbitrator(s) may take account of the extent (if any) to which a Party failed to co-operate with the other Party in constituting a DAAB; and
- If an award requires payment of an amount by one Party to the other, this payment becomes immediately due and without any certification or Notice.

Furthermore, it was made absolutely clear, that in case if a Party does not comply with a DAAB decision (irrelevant if it is "just" binding but not yet final), the other Party may refer the non-compliance to arbitration in order to enforce the compliance with the DAAB's decision.

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Questions – Answers



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End of Session 3

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Thank You for Your Kind Attention !

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