

FIDIC Latin America Contract Users' Conference



Panama City, 2-3 October 2018

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International Federation of Consulting Engineers
The Global Voice of Consulting Engineers



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My duty



- Main features of the new FIDIC 2017 **Client / Consultancy Agreement**
 - Structure, features, practical approach
- Making the most of the new suite of Agreements - top tips
 - from the responsibility perspective and the JV perspective
- Questions & Answers



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White Book 5th Edition – 2017








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Change

- **New**
 - Broader scope
 - Link to the function of the engineer, employer's representative, project manager or similar under a Works Contract.
 - Dispute Resolution improvement
 - DABs



- **Editorial**
 - More Clauses, now 10
 - More definitions
- **Fundamental changes**
 - Fit for purpose






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Major Changes



- **The Client**
 - shall provide information that it is able to obtain and which pertains to the Services → to be provided by Client
 - with due regard to the Programme (SC 2.1.1)
 - within reasonable time
 - is responsible for errors, omission and ambiguity in Client's information = rests with Client, and to be corrected by Client – possible Variation (SC 2.1.3)
 - Is now exposed to claims (see S-C 4.4)
- **The Consultant**
 - performs Services as per scope in Appendix 1 / No more Additional and Exceptional Services => only Services which are subject to Variations (Cl. 5), and possibly Exceptional Costs incurred
 - owes duty of care in reviewing Client's information (SC 2.1.2)
 - shall take in account function and purpose of Services (SC 3.3.2) → a fitness-for-purpose obligation, if achievable ... without changing duties as per S-C 3.3.1
 - shall comply with construction administration provisions (Cl. 3.9) – typically when the Consultant acts as certifier (e.g. engineer, employer's representative or project manager under a Works Contract)

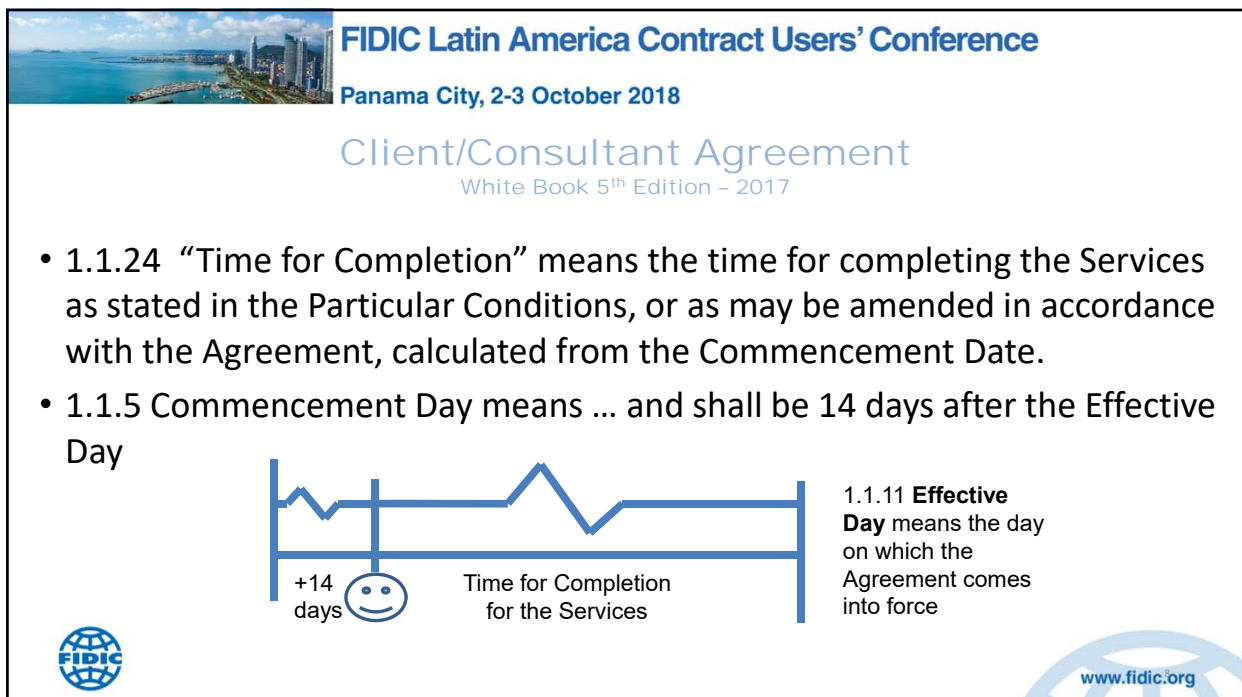
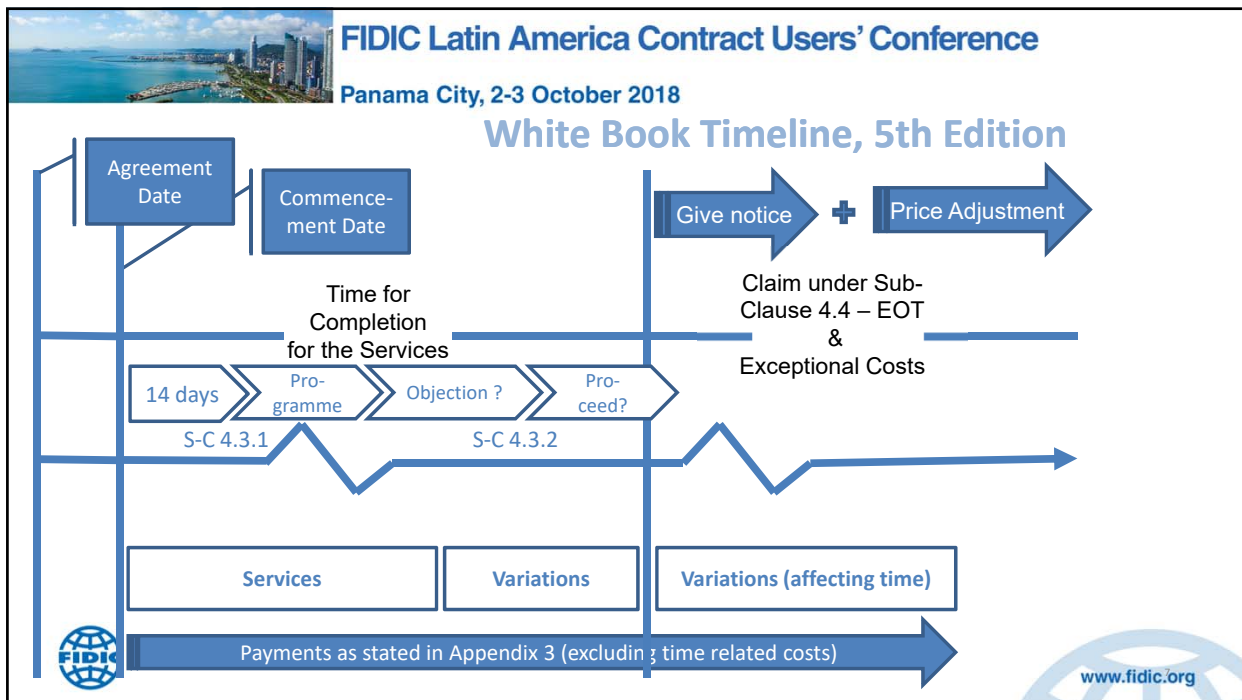




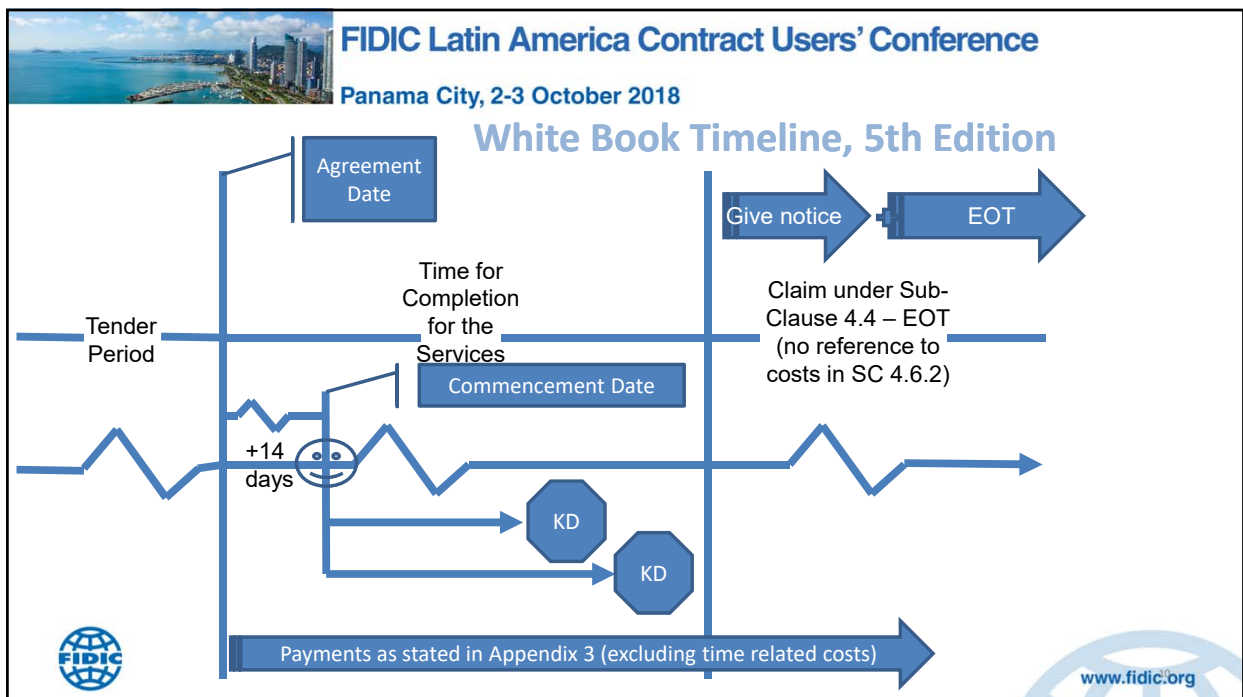
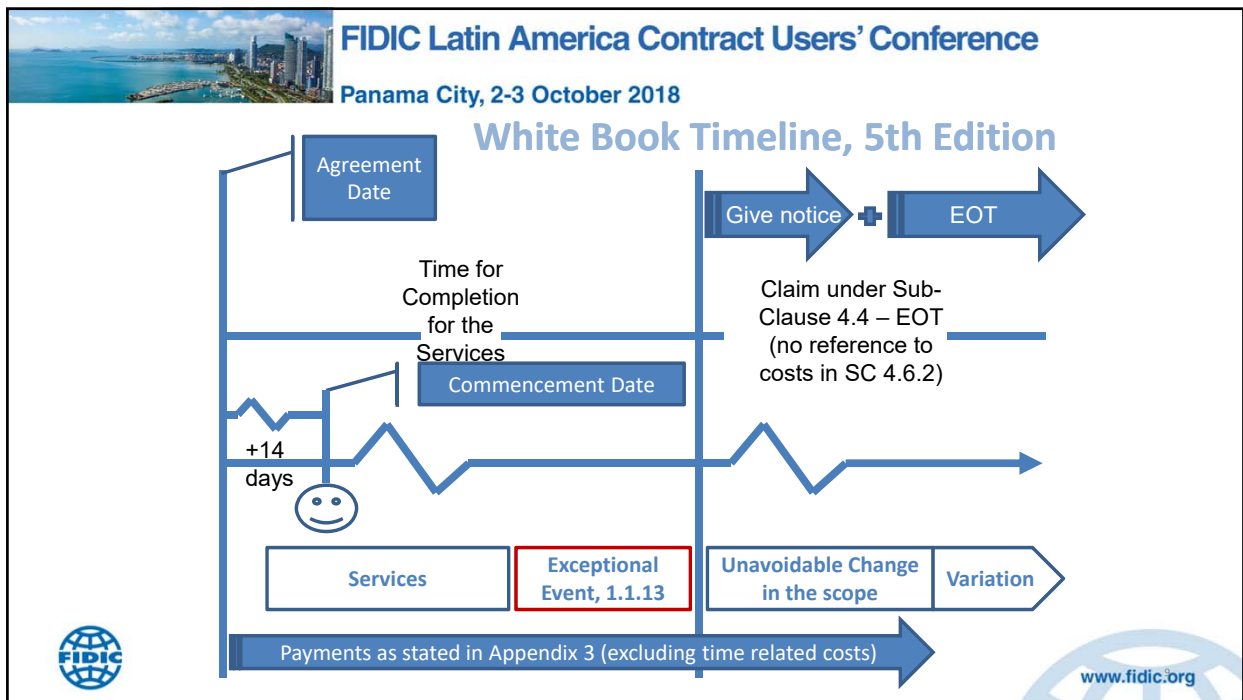
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Major changes

- **Time management**
 - Consultant shall provide a Programme for the performance of Services,
 - in accordance with Appendix 4, and to proceed accordingly (Cl. 4.3)
 - Express grounds for extension of the Time for Completion, with possible corresponding compensation for Exceptional Costs (Cl. 4.4)
 - Costs claims require a Notice
 - is empowered to instruct Consultant to show means of acceleration of rate of progress of the Services for delays attributable to Consultant (Cl. 4.5)
 - Concept of Exceptional Event introduced, which replaces « changed circumstances »: similar approach as FIDIC, 2nd Edition, superseding the former Force Majeure concept under the 1999 FIDIC Contracts
- **Variations to Services**
 - A fully revised Variation Clause (Cl. 5)
 - Client may initiate a Variation by giving a Notice (SC 5.1.1) / Consultant bound by Variation unless it notifies that it does not possess the relevant skills/resources to perform it, or it substantially changes the extent of nature of the Services (SC 5.1.4)
 - Value of Variation to be agreed before Variation proceeds, but if not possible/practicable to do so Client can instruct commencement →
 - Consultant entitled to compensation on a time-spent basis as per Appendix 3 (Cl. 5.2)
 - however, duplicity should be avoided: note that Consultant is entitled to payment for extra services (which may include time related overheads).







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My duty



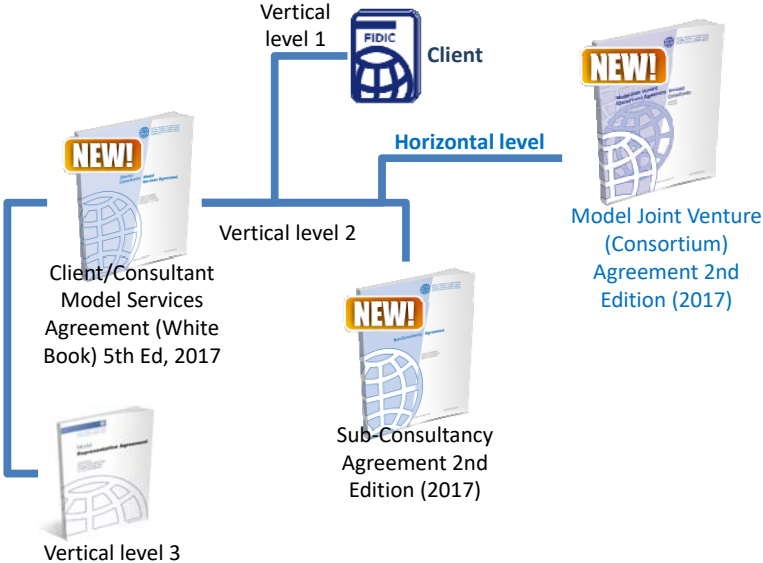
- Main features of the new FIDIC 2017 **Joint Venture Agreement**
 - Structure, features, practical approach
- Making the most of the new suite of Agreements - top tips
 - from the responsibility perspective and the JV perspective
- Questions & Answers








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The diagram illustrates the structure of FIDIC documents. At the top is 'Vertical level 1' with the 'FIDIC Client'. Below it is 'Vertical level 2' which branches into two paths: one leading to 'Vertical level 3' on the left (containing 'Client/Consultant Model Services Agreement (White Book) 5th Ed, 2017') and another leading to the right (containing 'Sub-Consultancy Agreement 2nd Edition (2017)'). A 'Horizontal level' line connects the 'FIDIC Client' to the 'Model Joint Venture (Consortium) Agreement 2nd Edition (2017)' on the right. All three documents at the bottom level are marked with a 'NEW!' badge.



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JV Agreement 2nd Edition – 2017

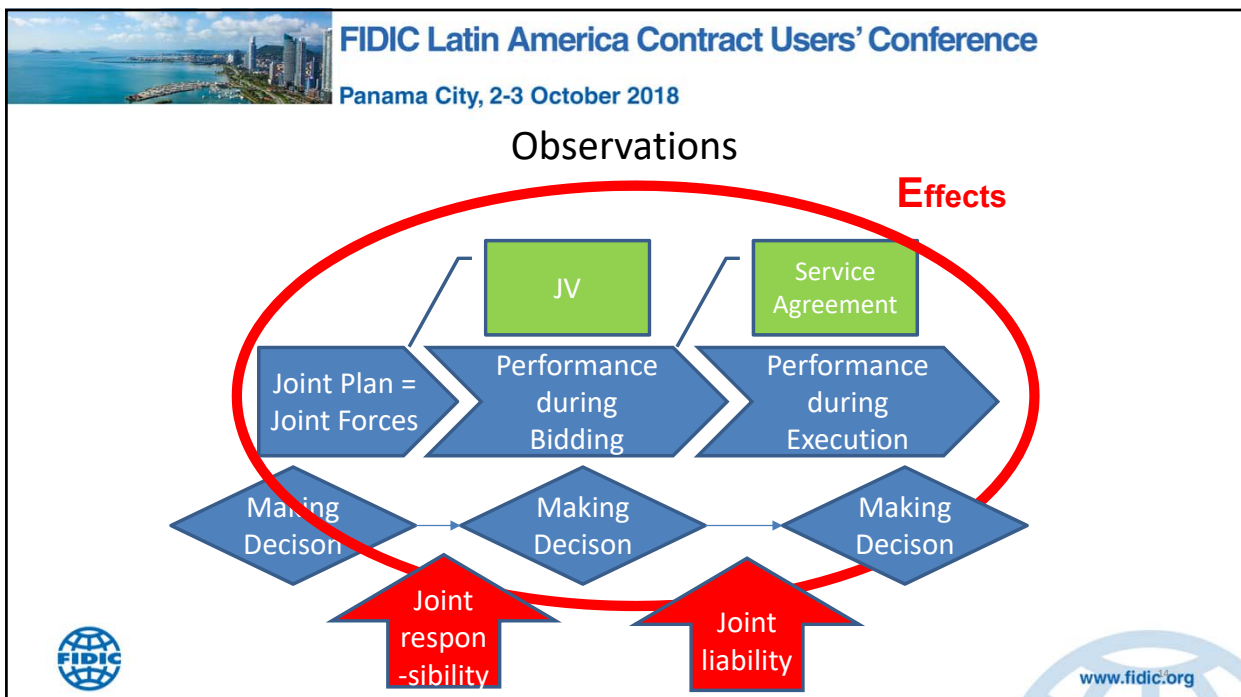
Designed for unincorporated JV, where a JV of firms acts as Consultant under a **Services Agreement** such as the **White Book**

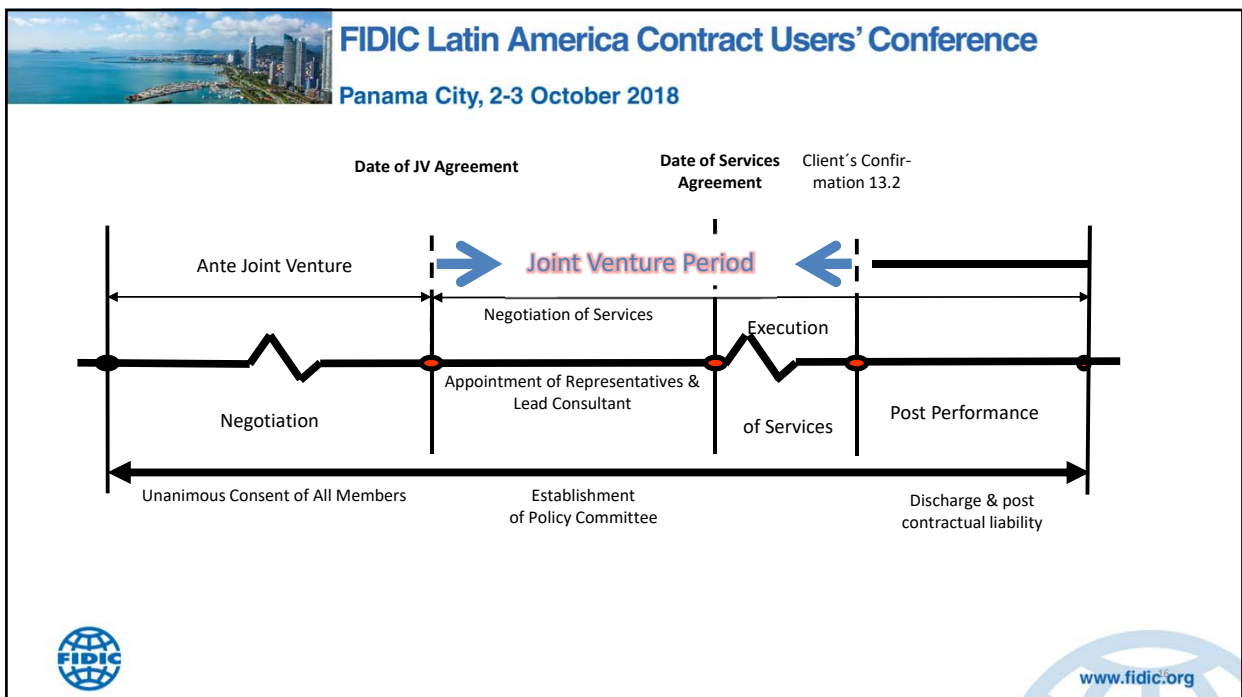
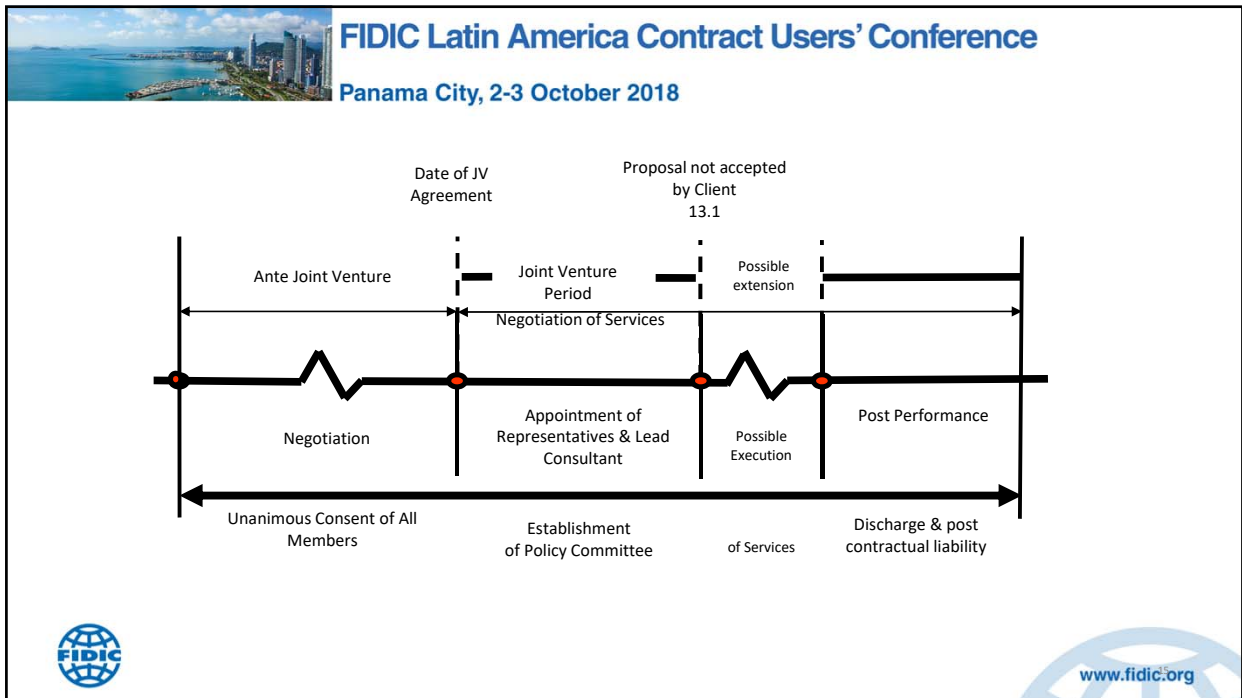
Structure:

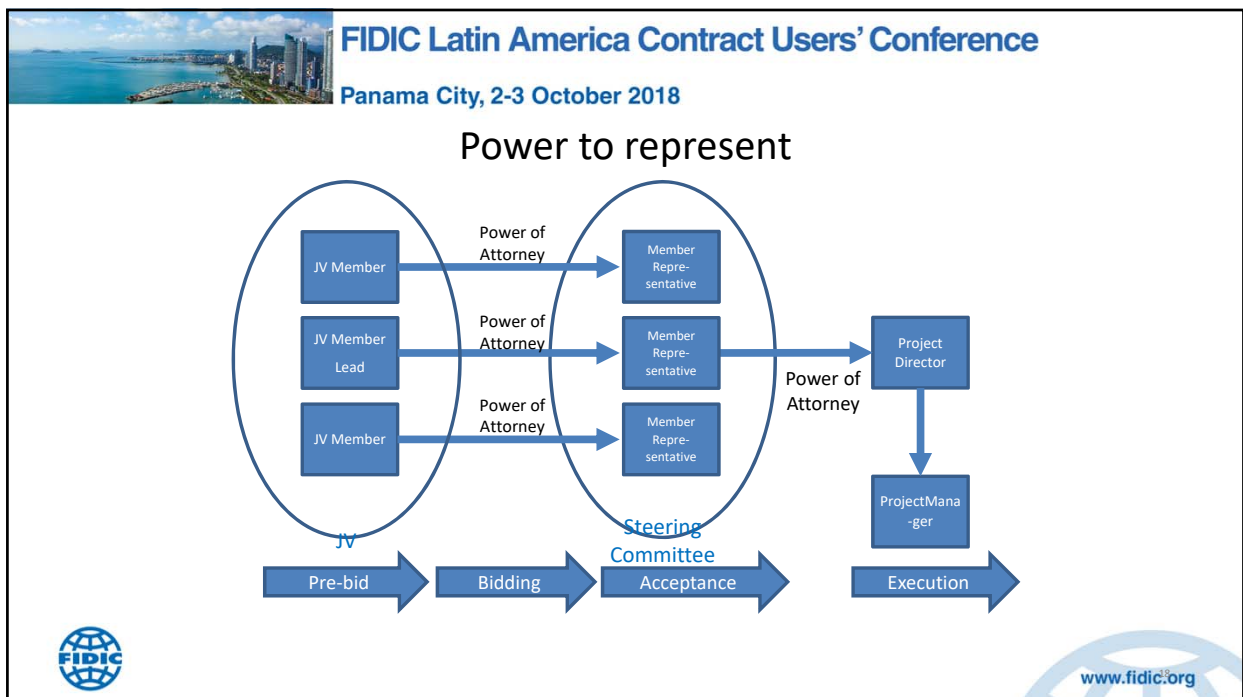
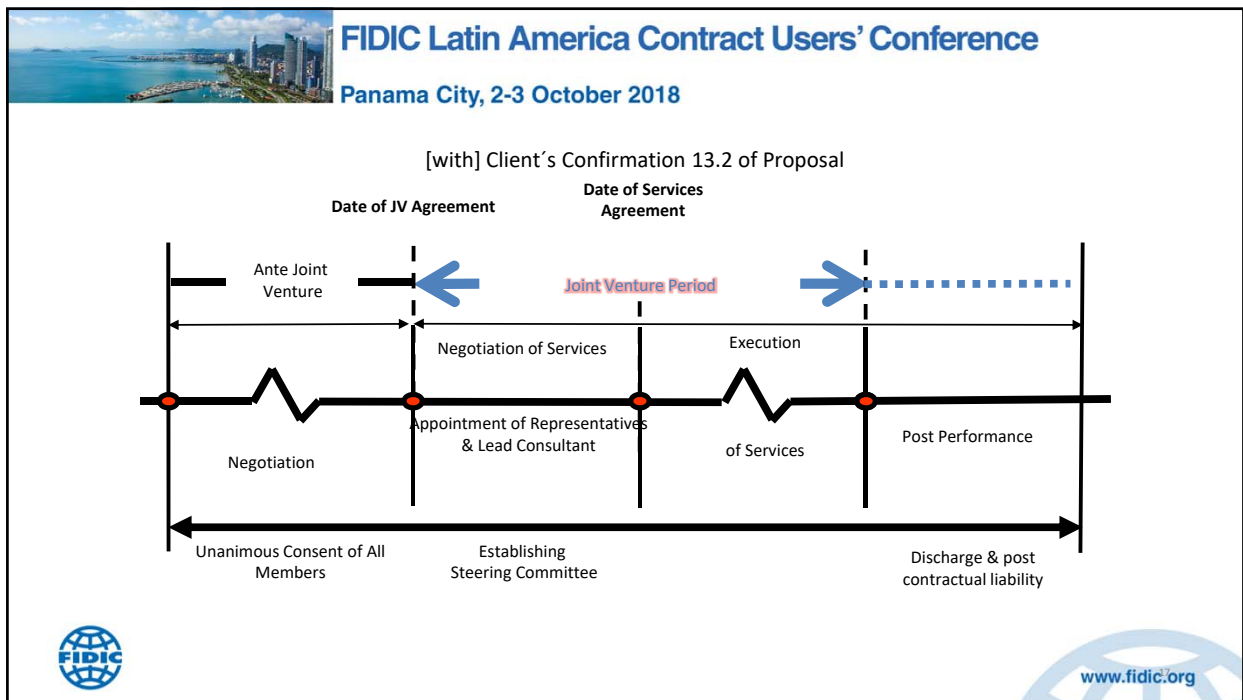
- Agreement General Conditions (24)
- Appendices 1 to 5
 1. Particular Conditions – Part A (References/Agreement Data) + Part B (Additional or Amended Clauses) – **prevailing on GC**
 2. Financial Administration Services
 3. Allocation of the obligations
 4. Financial Policy and Remuneration
 5. Steering Committee
 6. Project Director
 7. Project Manager
 8. Cross Guarantee and Indemnity Agreement
 9. Code of Conduct

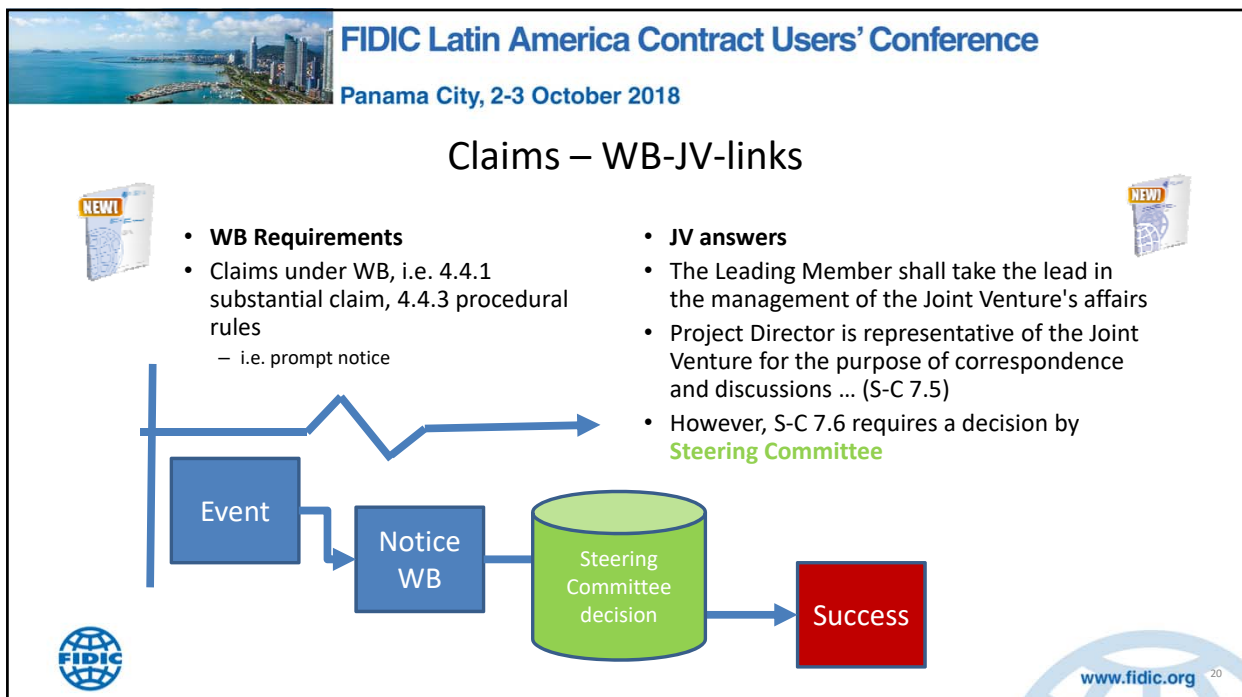
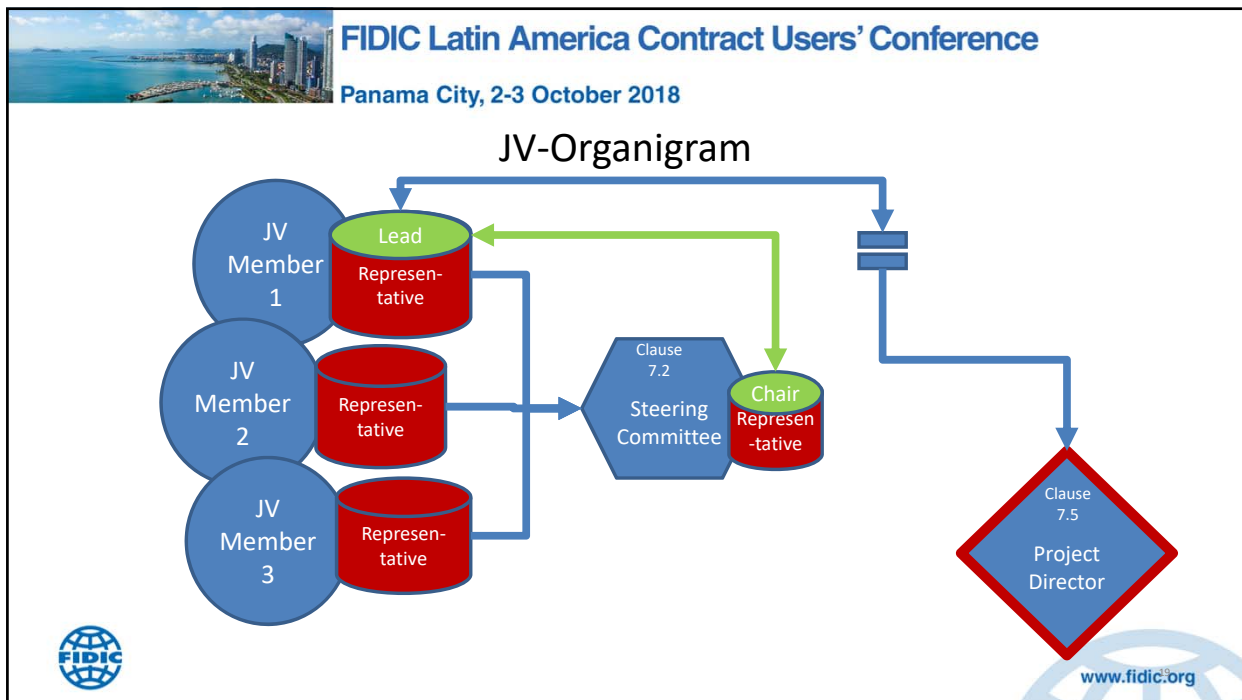


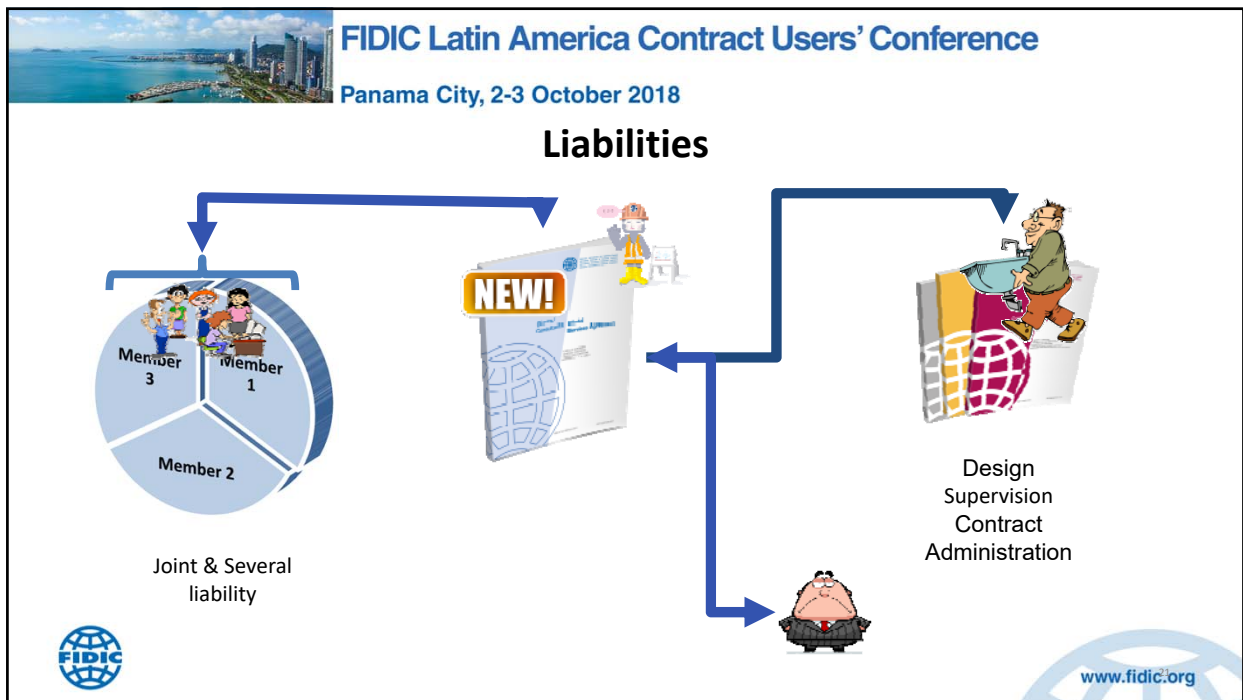










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Liabilities

- Joint and several responsibility and/or liability under Services Agreement due to JV
- Internal division of responsibility and liability
 - Related risks, inter alia
 - Insolvency
 - Under-performance
 - Poor management of WB

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JV Insurance Requirements



- (A) by Leading Member on behalf of JV for the benefit of all JV members, or
- (B) Client instructs otherwise
- (C) If A or B do not apply each member must provide insurance individually

However, the Leading Member shall (only) make "all reasonable efforts" to obtain and maintain insurance







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Insurance

- Issues if C applies:
 - Over-insurance or under- insurance
 - No insurance
 - Coordination of insurance packages
 - Recourse against JV members







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Insurance

- **Which (type of) insurance?**

On 3rd October 2017 finally the bottom nozzle slabs at Filter C were removed and the following pictures show the full extent of the damage:



An assessment of the reason of the damage as well as a way forward and remediation measures are being done by the Contractor and the Engineer.

- Which risks?
- Liability for
 - Design
 - fit for purpose
 - skill and care
 - bad quality
 - faulty contract administration
 - skill and care
- PI insurance
- Local (legal) requirements






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TOP TIPS

- **From the liability perspective**

- Discuss the needs with your insurance provider
- Insist on a clear and comprehensive service (scope) description
- Insist on a clear interface description
- Keep records
- Do not accept extensions of responsibility by instruction, for instance to check Performance Security, to increase rates temporarily, without clear authority in the construction contract









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TOP TIPS

- **JV perspective**
- Give the Project Director the authority which is needed
- Check always whether the individual performances of JV members fit with the integrated responsibility assumption










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Conclusions

- **White Book**
 - More modern
 - More balanced
 - More management requirements
 - Improved dispute resolution retaining co-operative und trust based spirit
- **Sub-Consultancy**
 - Fit with White Book
 - Not fully back-to-back
- **JV Agreement**
 - Fit with White Book
 - Management Approach retaining co-operative und trust based spirit










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- I kindly thank you for your attention.




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