

# FIDIC Middle East Contract Users' Conference

Dubai,  
24-27 February 2020

Case of Studies – Spotlight  
on the new 2017 Rainbow  
Suites

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International Federation of Consulting Engineers  
The Global Voice of Consulting Engineers



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## FIDIC Rainbow Suites 2017 Changes of 1999

Improved clarity & Certainty



Keep / enhance fair and balanced ***risk allocation***



Reinforcing the ***role of the Engineer;***



enhance ***project management*** 'tools'/mechanisms



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## FIDIC Rainbow Suites 2017 Changes of 1999

PII to include Fit for purpose Clause



Standing DAAB, **Ad hoc** is in guidance notes only



Exceptional Events replaced Force Majeures



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## FIDIC Rainbow Suites 2017 Changes of 1999

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### Detailed Particular

To be submitted within 84 days rather than 42 day

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Include a detailed description of the event or circumstance giving rise to the claim;

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Include a statement of the **contractual** or legal basis for the claim;

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Include all contemporary records on which the claiming party relies; and

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Include detailed supporting particulars of the amount of additional payment (or reduction in the contract price if the employer is the claiming party), extension of time or extension of the defects notification period claimed.



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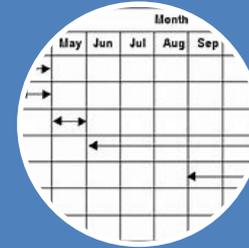
## Time Frames by Engineer



Engineer's **instructions**: no response < 7 days → deemed to have been revoked



if no Engineer's **Notice of agreement/determination** < 42 days (or >agreed by Parties):for a Claim – **deemed rejection**; for other matter – deemed **Dispute**



**Contractor's programme**: no Notice of non-compliance < 21 days initial / < 14 days revised programme → deemed Notice of No-objection → **Programme**





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## Time Frames by Employer



Access after taking-over: no response < 7 days →  
deemed consent for Contractor's to access during DNP





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## Time Frames by Contractor



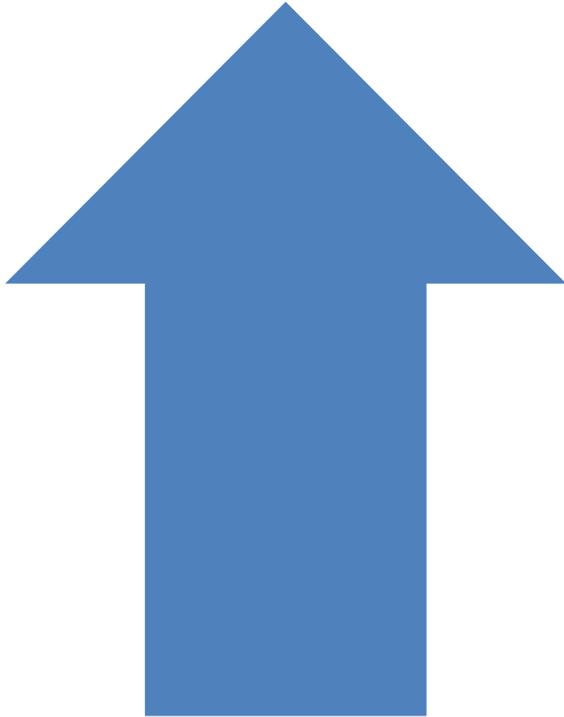
Final Payment Certificate: no Notice of claim / referral to DAB < 56 days → deemed acceptance of FPC





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Updated provisions to implement a **quality management system** and new provisions for a compliance verification system to demonstrate that the works, materials, plant and workmanship comply with the requirements under the Contract



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## Supporting Report

The Contractor is also now required to include in the **supporting report** for each submitted programme the proposals to ***overcome the effects of any delay(s)*** to progress of the Works



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## Time Frames by Contractor

There is a new requirement for the Contractor to submit a **health and safety manual** which has been specifically prepared for the Works and the Site



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## Best Practice

**Sub-Clause 7.5:** Under Sub-Clause 7.5 [*Defects and Rejection*] in FIDIC's 2017 contract updates, again to reflect best-practice, additional provisions have been included requiring the Contractor to submit a **proposal for remedying defects** and allowing the Engineer to review such proposals



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## unforeseeable conditions

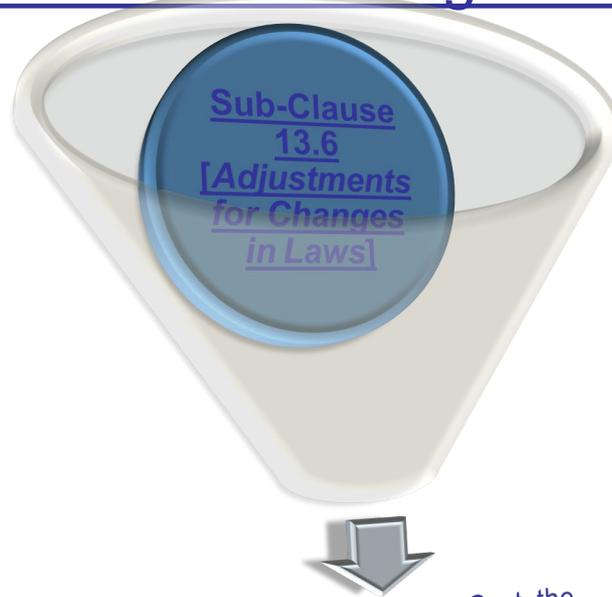
in the event that unforeseeable conditions are encountered:-  
notice by the Contractor →  
inspection and investigation by the Engineer → instruction by the Engineer → the Contractor's right to claim for any delay and cost → agreement/determination of the claimed delay and cost



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## Adjustments for Changes in Laws



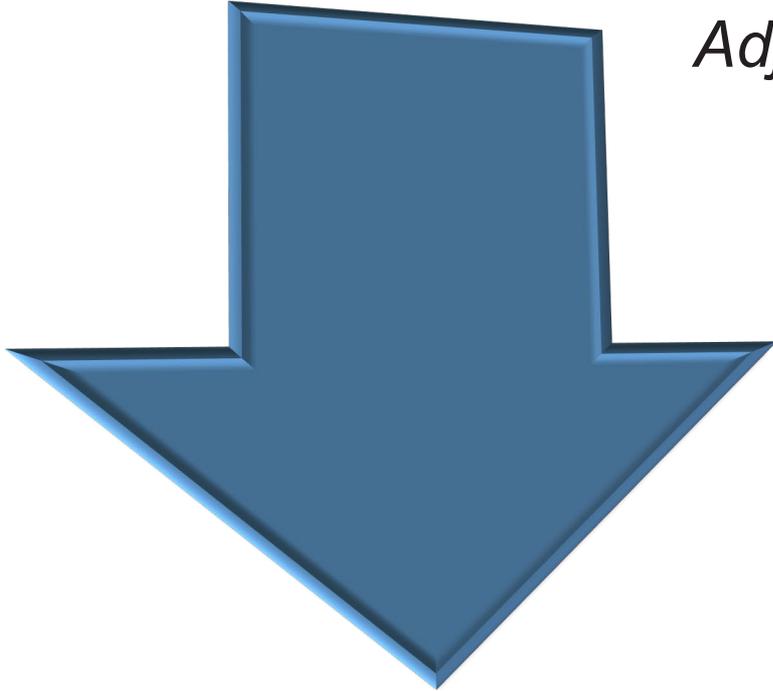
if there is a *decrease* in Cost, the Employer is now entitled to a reduction in the Contract Price



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## *Adjustments for Changes in Laws*



**Sub-Clause 13.6:** Under Sub-Clause 13.6 [*Adjustments for Changes in Laws*] the Contractor now has added entitlement to claim in the event of changes to permits/permissions/licences/approvals obtained for the Works, or to the requirements for the Contractor to obtain permits/permissions/licences/approvals



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## In FIDIC 2017

If an instruction does not state that it is a Variation,

the Contractor can give a Notice if he believes that it is a Variation,

and the Engineer (under the Red and Yellow Books 2017) or the Employer (under the Silver Book 2017) has the opportunity to confirm, reverse or vary the instruction within a stated time period

If this time period is not met, the instruction is deemed to have been **revoked**.



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FIDIC 2017, Under Sub-Clause 13.1 [Right to Vary] what was a **ban** on instructing an **omission** of any work to be carried out by others in the 1999 FIDIC contracts, Is now qualified by allowing the Parties to **agree** to such a Variation – to deal with omissions of this type that do sometimes happen and have caused **problems in practice**.



If such Omission instructed under FIDIC 2017, then the Contractor will be entitled to recover **loss of profit** and **other losses/ damages** (which is now **excluded** from the general statement of the Parties' non-liability for indirect losses





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Also under Sub-Clause 13.1, new grounds have been added to the Contractor's right to object to an instructed Variation

**RED** Book, the varied **work** was **Unforeseeable**; that it will have an adverse effect on the Contractor's ability to comply with his/her health and safety and/or environmental

obligations Yellow and Silver Books 2017, that the **varied work** may **adversely** affect the Contractor's **fitness-for-purpose** obligation in respect of the completed Works



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Sub-Clause 13.2, 13.3, 13.3.1: Sub-Clause 13.3 [Variation Procedure] has been **restructured** into two parts: Sub-Clause 13.3.1 [Variation by Instruction] and Sub-Clause 13.2 [Variation by Request for Proposal]. In the Yellow and Silver Books 2017, express provisions have been added to clarify how the Contract Price adjustment for a Variation should be valued.



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If the Contractor has been requested to provide a proposal for a Variation and Variation is not instructed.

There is a new right for the Contractor to claim the cost of preparing the proposal

It is worth noting that, under a number of sub-clauses, there are now new provisions requiring the Variation procedure of Sub-Clause 13.3 to be followed



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## FIDIC 2017 Under Sub-Clause 13.6 [Adjustments for Changes in Laws]

The **Contractor** now has added entitlement to **claim** in the event of **changes** to permits/ permissions/licenses/approvals obtained for the Works, or to the requirements for the Contractor to obtain permits/permissions/licenses/approvals.

Also added is an element of reciprocity between the Parties: the **Employer** can now claim a reduction in the Contract Price if a change in Laws gives rise to reduced costs for the Contractor.



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## Fall IN Clauses(2017)

4.2 PERFORMANCE SECURITY, If no amount is stated in the Contract Data

4.4.2 AS BUILT RECORD, If no as-built records to be prepared by the Contractor are stated in the Specification

4.4.3 Operation and Maintenance Manuals, If no operation and maintenance manuals to be prepared by the Contractor are stated in the Specification

8.9 Employer's Suspension, if the suspension is the responsibility of the Contractor, SC 8.10, 8.11 & 8.12 shall not apply



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11.3 if suspension is under SC 8.9 or 16.1 then this SC shall not apply

13.5 if day work schedule is not included in the Contract, this SC shall not apply

13.7 Adjustments for Changes in Cost If Schedule(s) of cost indexation are not included in the Contract

14.2 Advance Payment If no amount of advance payment is stated in the Contract Data

14.5 Plant and Materials intended for the Works If no Plant and/or Materials are listed in the Contract Data for payment when shipped and/or payment when delivered



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The complex formula that appeared under Sub-Clause 13.8 of the Red and Yellow Books 1999, and the simple reference to the Particular Conditions under the same sub-clause of the Silver Book 1999, has now been replaced in all three of FIDIC's contract updates 2017



A reference to a "Schedule of cost indexation" in the Contract - in order to give the Parties **full flexibility** to agree to the method of calculating the adjustment to the Contract Price arising from changes in labour/plant/materials.



If no such Schedule is included in the Contract, it is now stated that this Sub-Clause 13.8 does not apply.



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## Termination by Contractor

Sub-Clause 16.2  
[Termination by  
Contractor]

now the Contractor also  
has right to **immediately**  
terminate the Contract for  
any Employer's fraud /  
corruption / collusion



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## Employer's and Contractor's Claims

### Clause 20 [Employer's and Contractor's Claims]

- equal treatment of Employer's and Contractor's Claims

Employer's Claims  
now also subject to  
28-day notice →  
time-bar



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## Concurrency Concept – FIDIC 2017 – SC 8.5



“If a delay caused by a matter which is the **Employer's** responsibility is **concurrent** with a delay caused by a matter which is the **Contractor's** responsibility, the Contractor's entitlement to EOT shall be assessed in accordance with the rules and procedures stated in the Particular Conditions (if not stated, as appropriate taking due regard of all relevant circumstances).”





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## Concurrency Concept – FIDIC 2017 – SC 8.5

“True concurrent delay is the **occurrence** of **two** or **more** delay events at the **same** time, one an Employer Risk Event, the other a Contractor Risk Event, and the effects of which are felt at the same time. For concurrent delay to exist, each of the Employer Risk Event and the Contractor Risk Event **must be an effective cause of Delay to Completion** (i.e. the delays must both affect the critical path). Where Contractor Delay to Completion occurs or has an effect concurrently with Employer Delay to Completion, the Contractor’s concurrent delay should not reduce any EOT due.”



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## SCL protocol 2002 vs. 2017

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2017  
changes

Importance of claim submission rather than “wait & see”

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Additional methods of delay analysis rather than TIA

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Record keeping

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Global claims

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## Concurrency Concept – SCL 2017



Most of  
Contracts are  
unclear about  
concurrency



English law,  
Contractor will  
get time but no  
money in case  
of concurrency



Protocol sets a  
way on how to  
deal with  
delays,  
disruption,  
concurrency



SCL does not  
take precedence  
on the Contract,  
No force of law  
but a bench  
mark



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## Concurrency Concept – Case Study

A Contractor Risk Event will result in **five weeks' Contractor Delay to Completion**, delaying the contract completion date from 21 January to 25 February. Independently and a few weeks *later*, a variation is instructed on behalf of the **Employer** which, in the absence of the preceding Contractor Delay to Completion, would result in Employer Delay to Completion from 1 February to 14 February. The Protocol takes the position that the Employer Delay will not result in the works being completed later than would otherwise have been the case because the works were already going to be delayed by a greater period because of the Contractor Delay to Completion. The only effective cause of the Delay to Completion is the **Contractor** Risk Event.



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When the Engineer will require the Contractor's consent to issue a VO?

After the TOC

If the Variation will be out of the Site boundary Limit

When the Contractor cannot readily obtain the Goods required for the Variation, "Goods" means Contractor's Equipment, Materials, Plant and Temporary Work or any of them as appropriate, SC 1.1.5.2

When the VO is of the Contract not under the Contract

Scope of the Works is not as originally intended

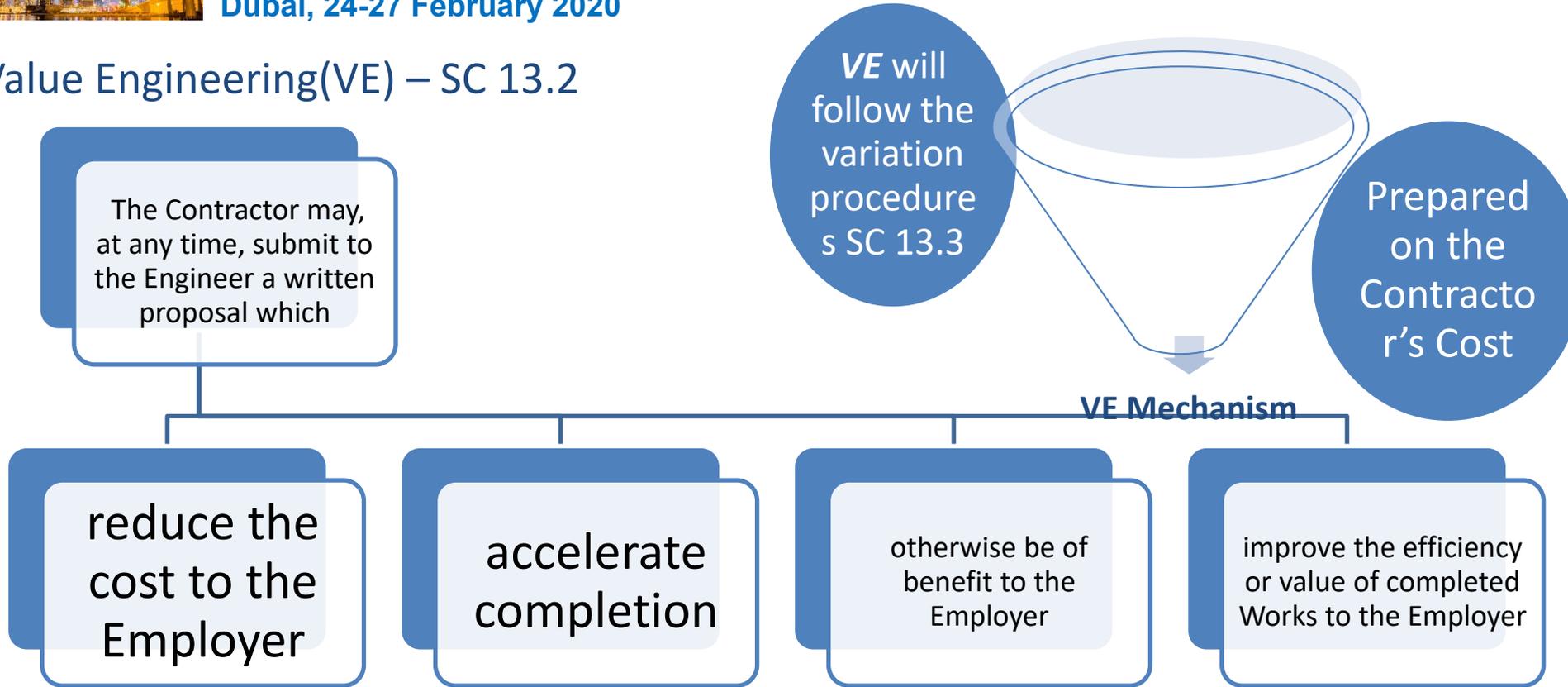
If the Works is omitted and will be executed by others, unless otherwise agreed in 2017 suites



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## Value Engineering(VE) – SC 13.2





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## VE – Case Study



Done by Amr Abdeljalil Hasan



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## VE – Case Study



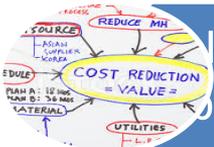
Contractor submitted a VE for a tower facade by changing material X to material Y.



VE SC 13.2 included in the PCOC a ratio for any VE as 70% for Employer & 30% for the Contractor.



The VE Cost was 1,000,000 Us \$.



If the Employer would like to sell the tower after 10 years the price will be 300,000 US \$ lesser because of using material Y instead of material X.



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## SLIDO Question

- If the VE is divided in the Contract as 70% Employer & 30 % Contractor then which one of the following is correct?
  1. VE Employer = 70% of original Works
  2. VE Employer = 70% of VE Works
  3. VE Employer = 70% of VE Works – market reduction fee due to reductions in quality, anticipated life or operational efficiencies



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Variations Proposal Request (VPR) advantages are:

To avoid  
uncertainty  
of  
commercial  
impacts in  
the Projects.

Less Claims

EoT(if any) is  
already  
forecasted.

Less Risks

Less  
Disputes

New Rates(if  
any) id  
already  
identified  
and  
specified.



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What if the Engineer did not respond to VPR?

No remedy but legally :Default part is a guarantor

there must be incurred damages

Contractor shall proof damages, burden to proof concept



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## Variation Evaluation

Variation Rate

Use same BOQ Rates



If No BOQ Rate

Use Similar Rate



If No Similar Rate

Propose Build up Rate



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## Prevention Principle



In Red/Yellow 2017 rainbow suites, there is new principle called prevention(8.4.e), **prevention** Leads to...? In common law?



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## Advance warning

Is the advance warning barring clause?



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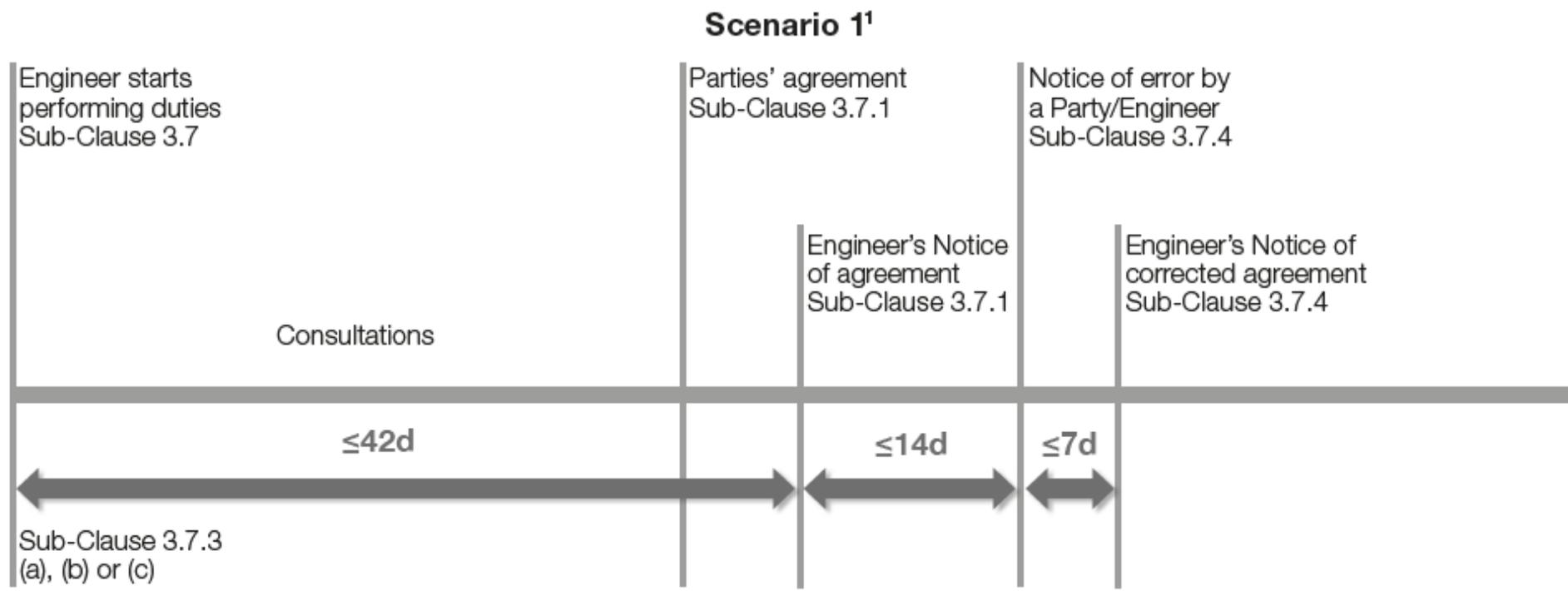
## Determination vs. Response →

**Agreement or Determination** When carrying out his/her duties under this Sub-Clause, the Engineer shall act

- neutrally between the Parties and shall not be deemed to act for the Employer.
- Whenever these Conditions provide that the Engineer shall proceed under this Sub-Clause to agree or determine any matter or Claim, the following procedure shall apply:

# Determination/Agreement – FIDIC 2017

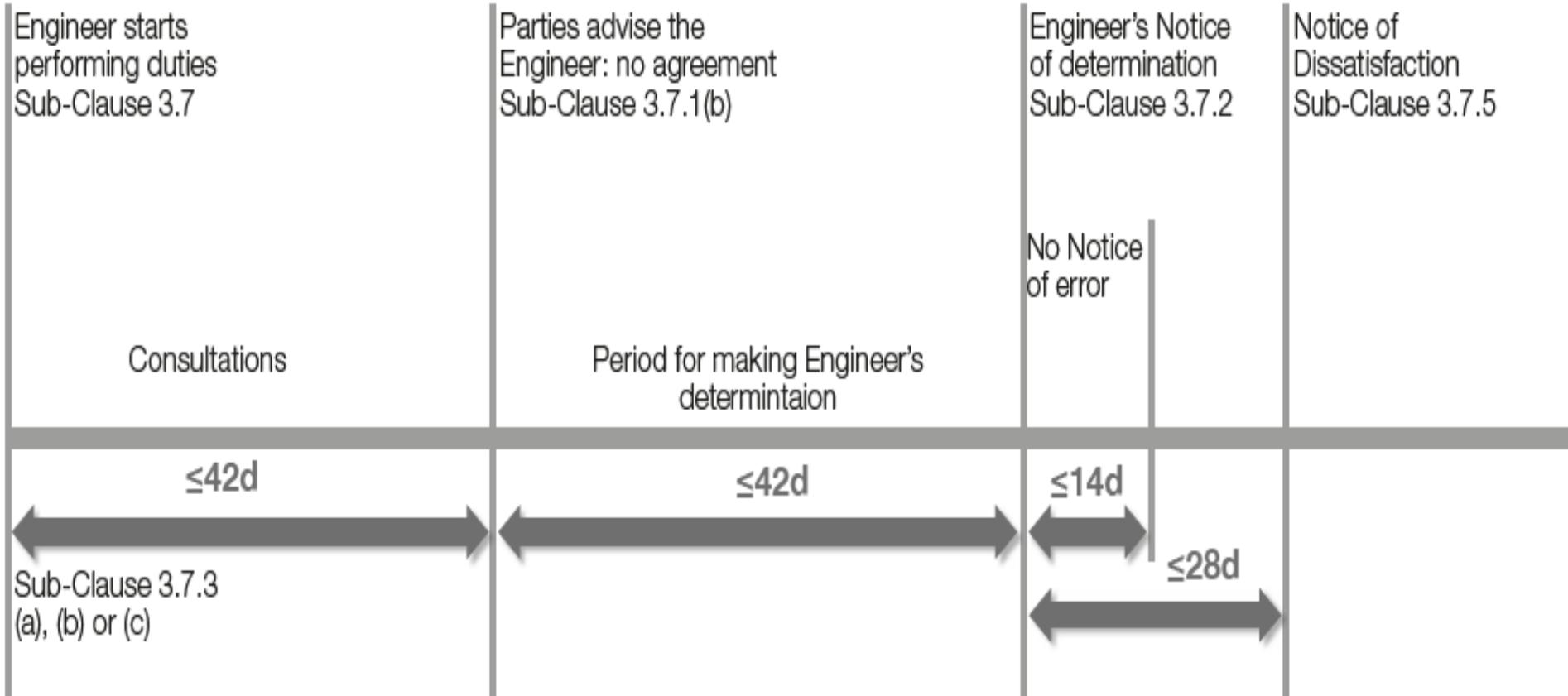
## Typical Sequence of Events in Agreement or Determination under Sub-Clause 3.7



**Scenario 2<sup>2</sup>**

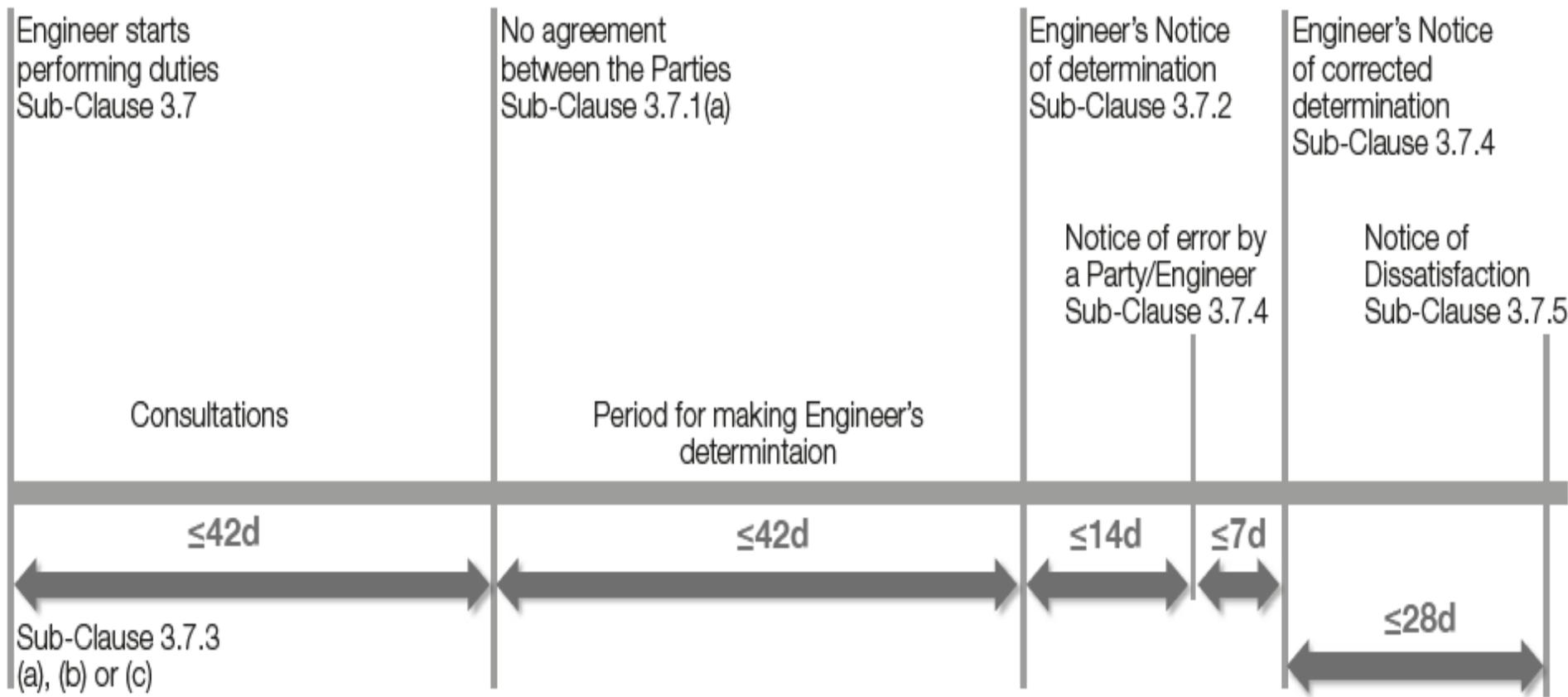
# Determination/Agreement – FIDIC 2017

## Scenario 2<sup>2</sup>



# Determination/Agreement – FIDIC 2017

## Scenario 3<sup>3</sup>





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## Determination/Agreement – FIDIC 2017

No agreement within 42 days, Engineer determines within 42 days, error found in the Engineer's determination and corrected

Agreement is reached within 42 days, error found in the Engineer's Notice of agreement and corrected.

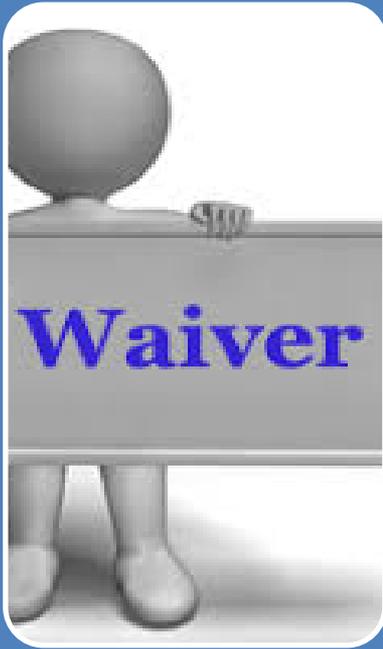
The Parties' early advice that agreement cannot be reached and so Engineer's determination is necessary, no error in Engineer's determination.



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## Claim waiver



If a party waived a right then it may be interpreted that the same right in future may be waived, hence, it is advised to state the following, such waiver is not in any way whatsoever is a waiver for any further right and/or claim



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## Payment on Account

If the Cost is yet to be agreed, then can the Employer pay on account to the Contractor?

Only incase an  
official EI is  
issued



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## Common Law, In the United States,

a 'constructive acceleration' doctrine has been established to permit a Contractor to claim his acceleration costs. The US doctrine comprises a six-stage test:



Delay entitle the Contractor to EOT



Timely Notice of Claim for Delay



Engineer's refusal/failure/silence to grant EOT



Engineer's implied instruction to complete



Contractor's Notice that the Engineer's action is a direction of acceleration



Contractor accelerated & incurred additional Cost





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## Common Law



Australian law does not recognize the term “constructive acceleration”, but there was an award of acceleration damages in a case (1969)



Not Recognized

Recovery strategy due to other party breach concentrating on the prevention/hindrance principle



Does not recognize the term “constructive acceleration”.

Contractor may use:  
Time at Large principle  
Delay mitigation claim  
Employer Contract breach



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## Civil Law



Not Recognized

Recovery strategy due to  
Article 246(good faith) &  
282(harm-making good)



Not Recognized

Recovery strategy due to other  
party breach & the principle of  
"Pacta sunt Servanda"



Not recognized

No Doctrine

Little likelihood of recovery





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1. The Engineer has the right to change the Works **sequence** or timing, but **does not likely have the right to change the Project Time for Completion.**
2. Acceleration may be issued as **VPR** (Variation Proposal Request) pursuant to Sub Clause 13.3.
3. Implied (Constructive) acceleration is crystal clear under **USA** doctrine, in the contrary of all other countries.
4. If the delay culpability if Contractor's override then the Engineer may instruct the acceleration pursuant to Sub Clause 8.6.



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5. If the delay culpability is Employer override and the Employer admitted the same, then acceleration may be instructed for the period of delay not more than that; i.e., to maintain the original Time for Completion as a Variation to the Contractor.
6. Claim of Constructive acceleration succeeded in many of above countries despite the jurisdiction do not recognize the concept.
7. Constructive Claim is not an easy claim, especially out of the US, it needs all pre requisite to be in place in addition to proper records



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THANK YOU

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