

# FIDIC Latin America Users' Conference

Lima, Peru  
12 & 13 September 2017

Sebastian Hök, PHD (University Göttingen)

FIDIC accredited trainer (fully accredited)  
FIDIC assessed and listed Adjudicator  
FIDIC Legal Advisor



International Federation of Consulting Engineers



## Dr. Hök



- has been involved in a variety of FIDIC projects by assisting the Engineer in particular in Bosnia, Pakistan, Vietnam
- has been involved in the work of consortia between consultants
- speaks French, English and German
  - is a fully accredited FIDIC trainer
  - is a FIDIC listed Adjudicator
  - has served as mediator under FIDIC White Book Agreements
  - is an experienced arbitrator
  - is a court expert
  - is a FIDIC legal adviser (ODB TG, Subcontract D&B) and the former Chair of the FIDIC Trainer Assessment Panel (2011-2016)
  - is a lecturer at Berlin University of Applied Science / Leuphana University

# White Book

- **History & Genesis**

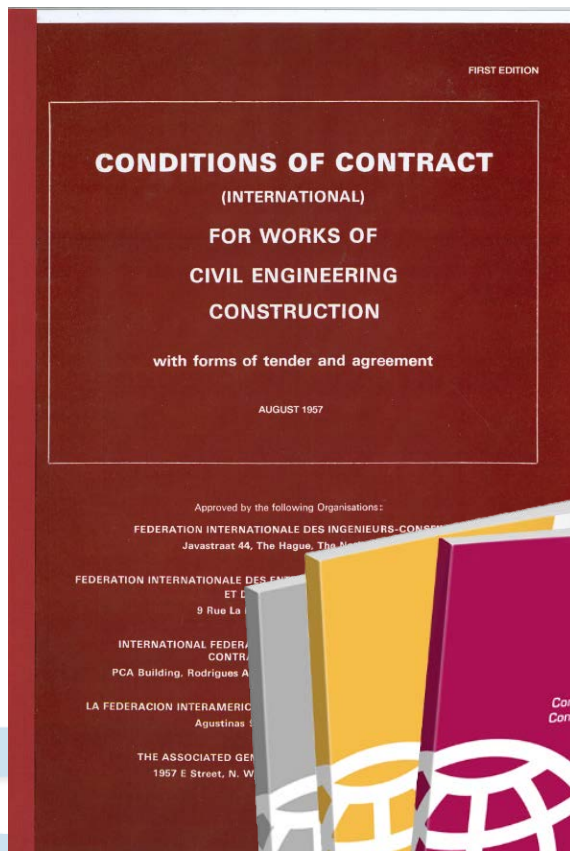
- History & Genesis
- Outline & Structure
- Changes & New Pillars
- New Approach to Change
- New Procedures
- Dispute Resolution
- Other Developments





## FIDIC Consultancy Agreements since 1990

### FIDIC Books since 1957



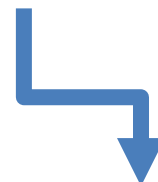
FIDIC Client / Consultant Relationship Committee, until 3rd Edition



Possible Cover Design, FIDIC 1999, 2nd Edition 2017



FIDIC Contracts Committee, since 4th Edition



# Conditions of Contract & Agreement



Vertical level 1



Client

Horizontal level

Vertical level 2



Client/Consultant Model Services Agreement (White Book) 5th Ed, 2017



Model Joint Venture (Consortium) Agreement 2nd Edition (2017)



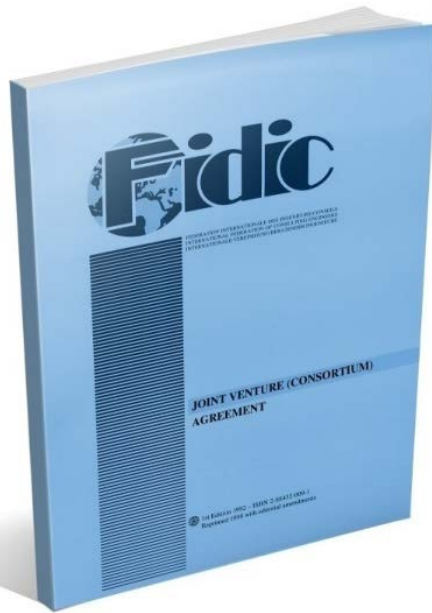
Sub-Consultancy Agreement 2nd Edition (2017)





Since years FIDIC has published model agreements for professionals services:

- **Client/Consultant, 4<sup>th</sup> Edition**
- **Joint Venture, 1<sup>st</sup> Edition**
- **Sub-Consultant, 1<sup>st</sup> Edition**
- **Representative, 1<sup>st</sup> Edition**



# White Book

- **Outline and Structure**



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# White Book 5<sup>th</sup> Edition – 2017

## Processing feedback on WB 2006...

Users feedback on White Book 2006	Positions taken with White Book 2016
<i>Normal, Additional and Exceptional Services = confusing</i>	<b>Services only</b> Exceptional Event and Exceptional Costs
<i>Order of precedence of Agreement documents = confusion</i>	Order of precedence stated in Form of Agreement, and Cl. 1.15
<i>Client's obligation to provide the Client with information in a reasonable time =&gt; what is reasonable » ? No reference to programme?</i>	Obligation linked with Programme (now defined term). « Reasonable » - stays in, we consider not practicable to define it further
<i>No fitness for purpose obligation?</i>	<b>Neither a desired nor an internationally recognized standard</b> for professional services / local legal particularities => PC
<i>No termination at will clause ? No termination with immediate effect for corruption?</i>	Client's termination at will – SC 6.4.1(d) Immediate termination for corruption – Client SC 6.4.1(c)/Consultant SC 6.4.2(d)
<i>Consultant only liable if breach of obligation to act with reasonable skills &amp; care?</i>	Consultant and Client <b>liable for breach of any provision</b> under the Agreement
<i>Etc.</i>	

## White Book 5<sup>th</sup> Edition – 2017



## Client/Consultant Agreement

White Book 5<sup>th</sup> Edition - 2017  
Content



Form of Agreement

Particular Conditions - Template

Rules for Adjudication

General Conditions  
of Client/Consultant  
**MODEL SERVICES  
AGREEMENT**



# Client/Consultant Agreement

White Book 5<sup>th</sup> Edition – 2017

- suitable for general use for most services provided by consulting engineers [but also architects, project managers, quantity surveyors], including
  - pre-investment and feasibility studies,
  - detailed design,
  - construction management and contract administration,
  - supervision,
  - project management, and
  - quantity surveying





# Documents

forming part of the Agreement [in practice]

## Agreement



a) Form of Agreement

b) The Client/Consultant Model Services Agreement

- i. Particular Conditions
- ii. General Conditions

c) Appendices 1-5

d) Any letter of acceptance by the Client ...

e) Any letter of offer/proposal by the Consultant ...

1. Scope of Services
2. Personnel, Equipment, Facilities & Services of Others to be provided by Client
3. Remuneration & Payment
4. Programme
5. Rules for Adjudication



## Client/Consultant Agreement

White Book 5<sup>th</sup> Edition - 2017

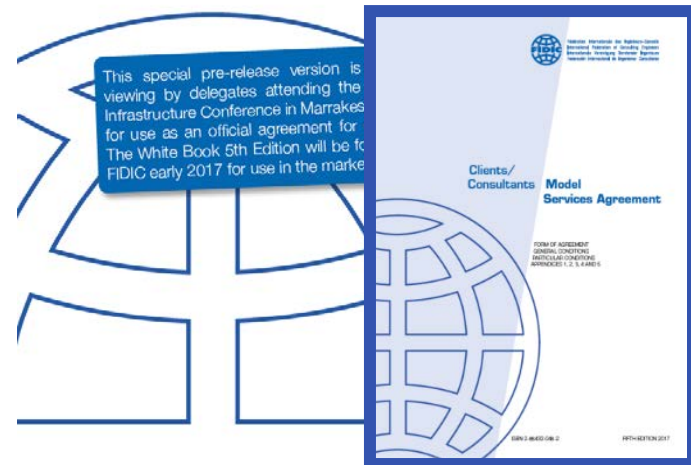
White Book now has 10 sections

1. General Provisions – definitions and general matters
2. The Client - duties and obligations
3. The Consultant - duties and obligations
4. Commencement and Completion
5. Variation to Services **New**
6. Suspension and Termination **New**
7. Payment
8. Liabilities
9. Insurance
10. Disputes – adjudication and arbitration



### Client/Consultant **Model Services Agreement**

FORM OF AGREEMENT  
GENERAL CONDITIONS  
PARTICULAR CONDITIONS  
APPENDICES 1, 2, 3, 4 AND 5



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# A Balanced Approach

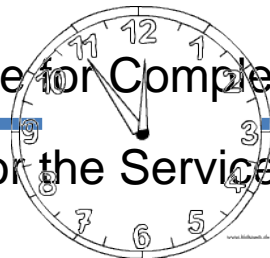
- The Consultant's duty to provide the Services + Variations
- The Client's duty to pay the price [as adjusted]



# WB

Agreement Date

Time for Completion  
for the Services



Give notice

+

Price Adjustment

Claim under Sub-  
Clause 4.4 – EOT &  
Exceptional Costs

Scope and Exceptional  
Costs as the case may be

## White Book Timeline, 5th Edition

**Services**

**Variations**  
(change of scope)

**Variations**  
(affecting time)

Payments as stated in Appendix 3 (excluding time related costs)



# White Book

- **Changes & New Pillars**



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# Client/Consultant Agreement

White Book 5<sup>th</sup> Edition – 2016

**3.1.1** 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 services for projects of similar size and complexity.

**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 the function and purpose** that may be described in Appendix 1 [Scope of Services].

**3.3.3** The Consultant shall comply with all regulations, statutes, ordinances and other forms of standards, codes of practice and legislation applicable to the Services and the Agreement.

# New wording on liability

- SC 6.1.1 The Consultant shall only be liable to pay compensation to the Client arising out of or in connection with the Agreement **if a breach of Clause 3.3.1 is established** against him
- SC 6.1.2 The Client shall be liable to the Consultant if a **breach** of his duty to the Consultant is established against the Client
- Consultant shall only be responsible for skill and care [SC 3.3.1]
- Reciprocal Parties' liability for breach of Agreement [8.1]
- Party's liability limited
  - to such damages which are reasonably foreseeable, 8.1
  - in respect of
    - duration [8.2]
    - maximum amount [8.3]
  - in the event of joint liable to relevant proportion



# Struggle for the right way

- Traditionalists **vs** advocates of a more modern approach on the one hand side and Common Law **vs** Civil law practitioners on the other side --- struggled for the proper approach related to the key question ...
- **wherefore consultant engineers shall be responsible (thus be liable)?.**





White Book 5<sup>th</sup> Edition – 2017The Consultant – Clause 3  
Skill & care vs fitness-for-purpose

- The TG was awake to that in a broad number of **civil law jurisdictions** (ex: Algeria, Egypt, France, Indonesia, Iraq, Jordan, Kuwait, Lebanon, Philippines, Qatar, Saudi Arabia, Syria, UAE) the designer (and/or site supervisor) of a construction project is/are under **a strict and joint and several liability** with other members of the “construction team” if the Works collapse or are likely to collapse or show similar defects even if the defect arises from a defect in the soils [subject to further qualifications on a case by case basis].
- Also in a number of civil law jurisdictions (ex: Austria, Germany, Switzerland) design agreements will be classified as contracts whereunder the services shall be performed fit for purpose – hire of the project – **locatio nconductio operis**.
- However, the TG has reviewed standard forms of services contracts from a wide range of countries, and has come to the conclusion that such specific legal requirements in such countries **do not form, to date, an internationally widely recognized practice**.



Wisely the decennial liability standard has then **not been defined as the standard of performance** under the updated White Book. As usual though, local specificities can be and should be addressed through **Particular Conditions**.



# Criticism

- Probably the focus on the **decennial** liability was systematically too narrow.
  - French law provides for four different classes of liability:
    - One year „proper completion guaranty“ – garantie de bon achèvement
    - two-year "**proper operation warranty**"
    - Decennial guaranty – garantie décennale
  - Conclusion
    - The TG may have overestimated the French decennial liability and underestimated the general legal approach under **Roman law** which classifies design contracts as „locatio conductio operis“ contracts,
    - meaning that the designer does not provide speculative services
    - meaning that also the design is likely to owe a duty to achieve an ultimate result
- Does the Vietnamese Law No. 16-2003-QH11 require that the designer achieves an ultimate result?



# Construction Law



- ARTICULO 1784

- Responsabilidad del contratista por destrucción, vicios o ruina
- Artículo 1784
- Si en el curso de los cinco años desde su aceptación la obra se destruye, total o parcialmente, o bien presenta evidente peligro de ruina o graves defectos por vicio de la construcción, el contratista es responsable ante el comitente o sus herederos, siempre que se le avise por escrito de fecha cierta dentro de los seis meses siguientes al descubrimiento. Todo pacto distinto es nulo.
- El contratista es también responsable, en los casos indicados en el párrafo anterior, por la mala calidad de los materiales o por defecto del suelo, si es que hubiera suministrado los primeros o elaborado los estudios, planos y demás documentos necesarios para la ejecución de la obra.
- El plazo para interponer la acción es de un año computado desde el día siguiente al aviso a que se refiere el primer párrafo.

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# Provocative Question

- Contractor's liability for destruction, defects or ruin  
Article 1784 <sup>o</sup> - If, within five years of its acceptance, the work was destroyed, totally or partially, or presents an obvious danger of ruin or serious defects due to construction defects, the contractor is liable to the principal or his heirs, provided that he is notified in writing of a certain date within the six months after the discovery. Any contradicting agreement is void.
- **Does the law in Peru expect the designer to apply diligence and care only or does it require the designer to achieve that the foundations do not sink?**
- The law of Peru does anyway require „acceptance of the works“ and this presumably implies the test on whether the works are „fit for purpose“.
- Article 1785 discharges the contractor from liability who complies with instructed design.





# White Book

- **New Approach to Change**



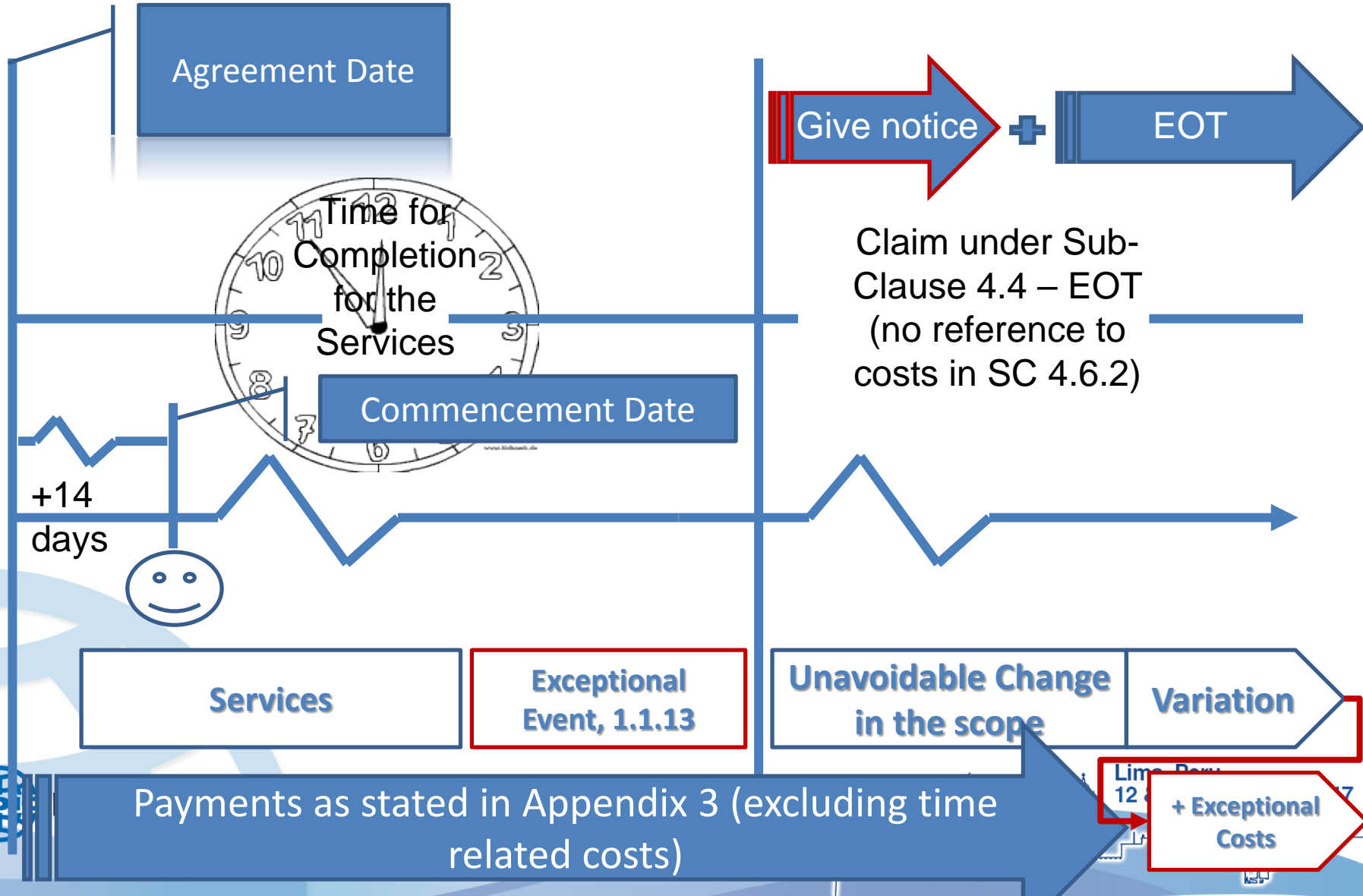
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## Client/Consultant Agreement

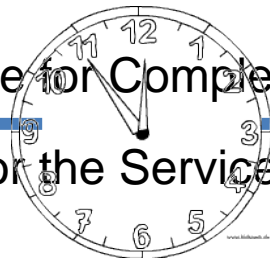
White Book 5<sup>th</sup> Edition – 2017



# WB

Agreement Date

Time for Completion  
for the Services



Give notice

+

Price Adjustment

Claim under Sub-  
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Exceptional Costs

Scope and Exceptional  
Costs as the case may be

## White Book Timeline, 5th Edition

**Services**

**Variations**  
(change of scope)

**Variations**  
(affecting time)

Payments as stated in Appendix 3 (excluding time related costs)

# Client/Consultant Agreement

White Book 5<sup>th</sup> Edition – 2016 – Pre-Release

- 1.1.24 “Time for Completion” means the time for completing the Services as stated in the Particular Conditions, or as may be amended in accordance with the Agreement, calculated from the Commencement Date.
- 1.1.5 Commencement Day means ... and shall be 14 days after the Effective Day



1.1.11 **Effective Day** means the day on which the Agreement comes into force





# Management of Change

- Change occurs →
  - Change in legislation
  - Exceptional Event
    - S-C 1.1.13
  - Suspension
  - Variation [subject to express Variation Notice, 1.3]
- Variation (of Services)
  - Forced [S-C 4.6.1, or for convenience]
- Extension of Time, S-C 4.4.1
- Payment of Exceptional Costs



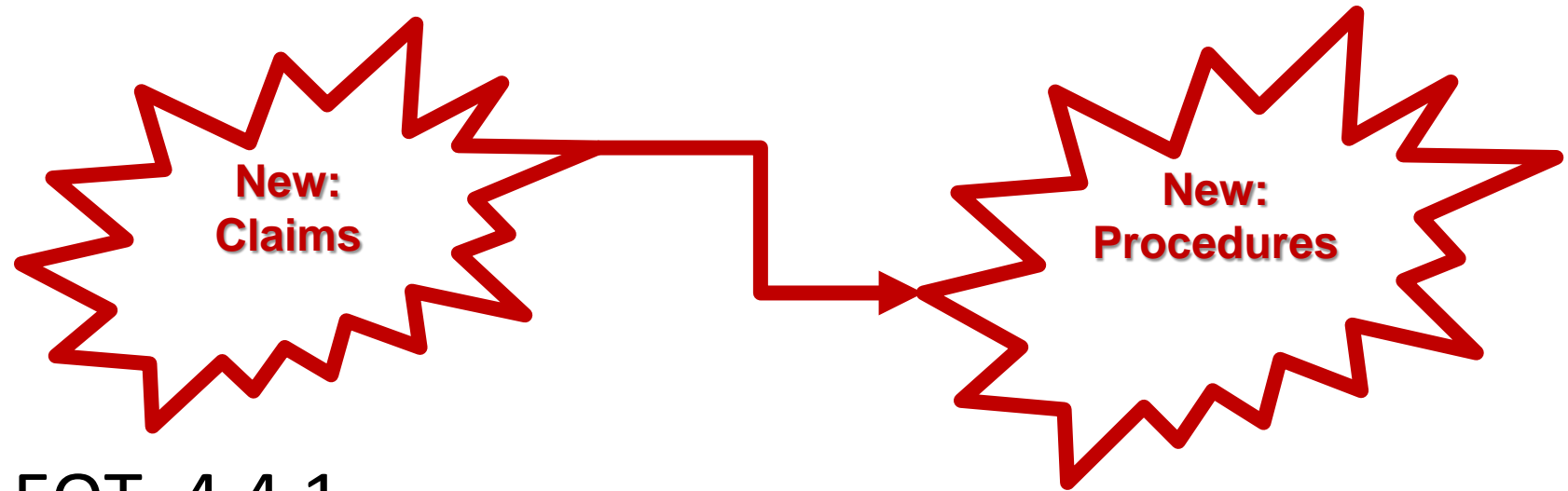
**New:  
Claims**

**New:  
Procedures**



## Client/Consultant Agreement

White Book 5<sup>th</sup> Edition – 2017



- EOT, 4.4.1
- Exceptional Costs,
- Variation, if Exceptional Event



# Client/Consultant Agreement

White Book 5<sup>th</sup> Edition – 2017

- New Wording adopted from **FIDIC Gold Book**

- 1.1.13 “**Exceptional Event**” means an event or circumstance which is (a) beyond a Party’s control; (b) which the Party could not reasonably have provided against before entering into the Agreement; (c) which having arisen, such Party could not reasonably have avoided or overcome; and (d) which is not substantially attributable to the other Party. An Exceptional Event may include, but is not limited to, events or circumstances of the kind listed below, subject to (a) to (d) above:
  - war, hostilities (whether war be declared or not), invasion, act of foreign enemies
  - rebellion, terrorism, revolution, insurrection, military or usurped power or civil war
  - riot, commotion, disorder, strike or lockout by persons other than the Consultant’s personnel and other employees of the Consultant and Consultant’s sub-consultants
  - munitions of war, explosive materials, ionising radiation or contamination by radio-activity except as may be attributable to the Consultant’s actions
  - natural catastrophes such as earthquake, hurricane, typhoon or volcanic activity



# Exceptional Costs

- **1.5.2** Change to national (or state) legislation, any statute, statutory instrument, order, regulation, bylaw, code or other legislation in any country in which the services are required by the Client,
- **4.4.3** Extension of Time under Sub-Clause 4.4.1
- **6.3.3** Suspension of Services
- **6.5.3** Termination in accordance with Sub-Clause 6.4.1 (d) or (e) or Sub-Clause 6.4.2 [Termination of Agreement]
  - in particular termination for convenience



- → agreed remuneration shall be adjusted in accordance with Sub-Clause 7.1.2 [Payment to the Consultant],
  - and the Time for Completion amended in accordance with Clause 4.4 [Delays].



# Client/Consultant Agreement

White Book 5<sup>th</sup> Edition – 2017

- **1.1.12 Exceptional Costs** means the costs , not otherwise compensated under the Agreement, arising out of any necessary work, cost, expense or delay incurred by the Consultant which is additional for the Services (or Variations) and which is necessarily and unavoidably performed under the Agreement and in each case identified as such in the Agreement.



# Exceptional Costs

- FIDIC Advise:
  - Appendix 3 should cover „rates and prices to be applied to Variations (where appropriate) **or** Exceptional Costs” →
- 1.1.12 Exceptional Costs
- 1.1.13 Exceptional Event



# White Book

- **New Procedures**



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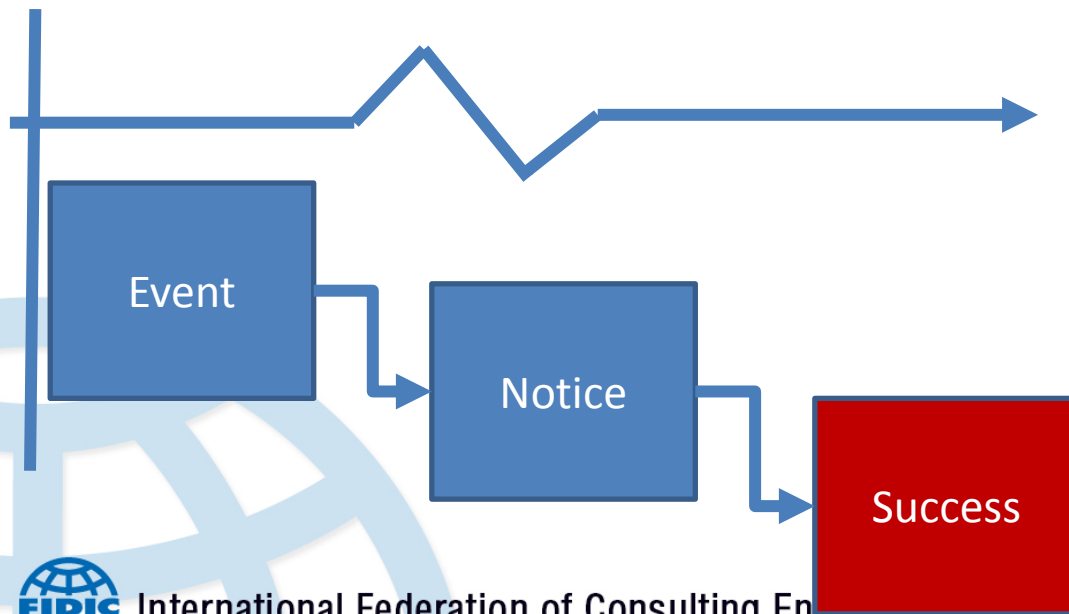
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# Notice Timeline under

- As soon as reasonably practicable
- → **Notice**
- Consultant considers there being
  - Change in legislation (1.5.2)
  - a Variation (5.1.3)
  - Exceptional Event (6.1.2)
  - Exceptional Costs (1.5.2, 4.4.3, 6.3.3, 6.5.3)





# Exceptional Event

- Exceptional Event (EE)
  - Give notice
- Unavoidable change of scope of Service
  - Client shall issue a Variation, 4.6.2 + 5.1
- **EE** causes delay (no reference to Variation)
  - Extension of Time, 4.4 →
- Incurrence of Exceptional Costs
  - 4.4 → entitlement to Exceptional Costs
- No notice no claim?
- What happens, if not?
  - No as deemed as ...
  - Services remain unextended
- Clear answer regarding time related Exceptional Costs: Claim under 4.4.3

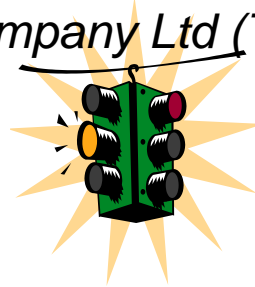




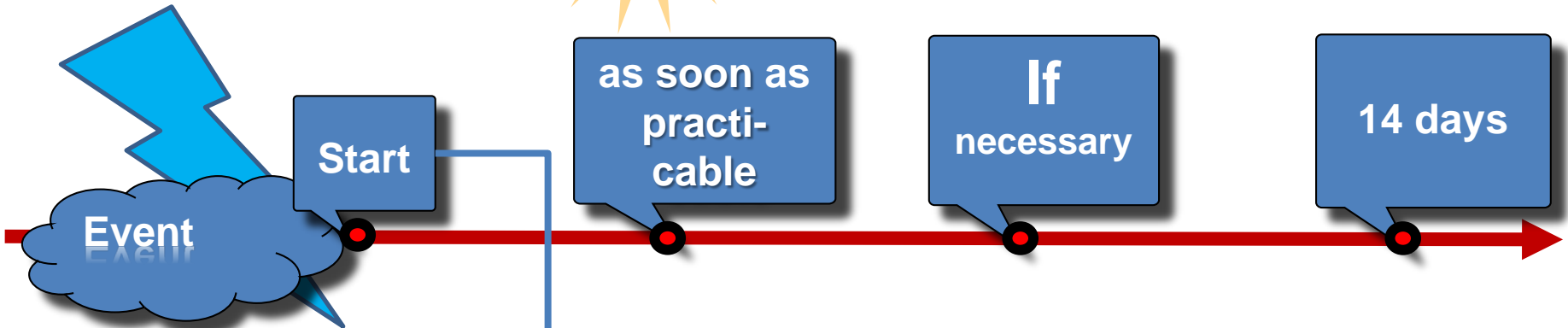
**Good to read:** *NH International (Caribbean) Ltd v National Insurance Property Development Company Ltd (Trinidad and Tobago)*, [2015] UKPC 37



Sub-Clause 1.5.2, 4.4.3, etc.



Sub-Clause 7.1.2



**the event occurs**

the Consultant becomes aware of the event and considers himself to be entitled Exceptional Costs

the Consultant shall give notice

**condition precedent??**

Event = e.g. incurrence of Exceptional Costs

the Consultant gives a notice to amend the provisions of Agreement (if necessary, e.g. 1.5.2)

the Client pays reasonable rates & prices + cost of all expenditure reasonably incurred



# White Book

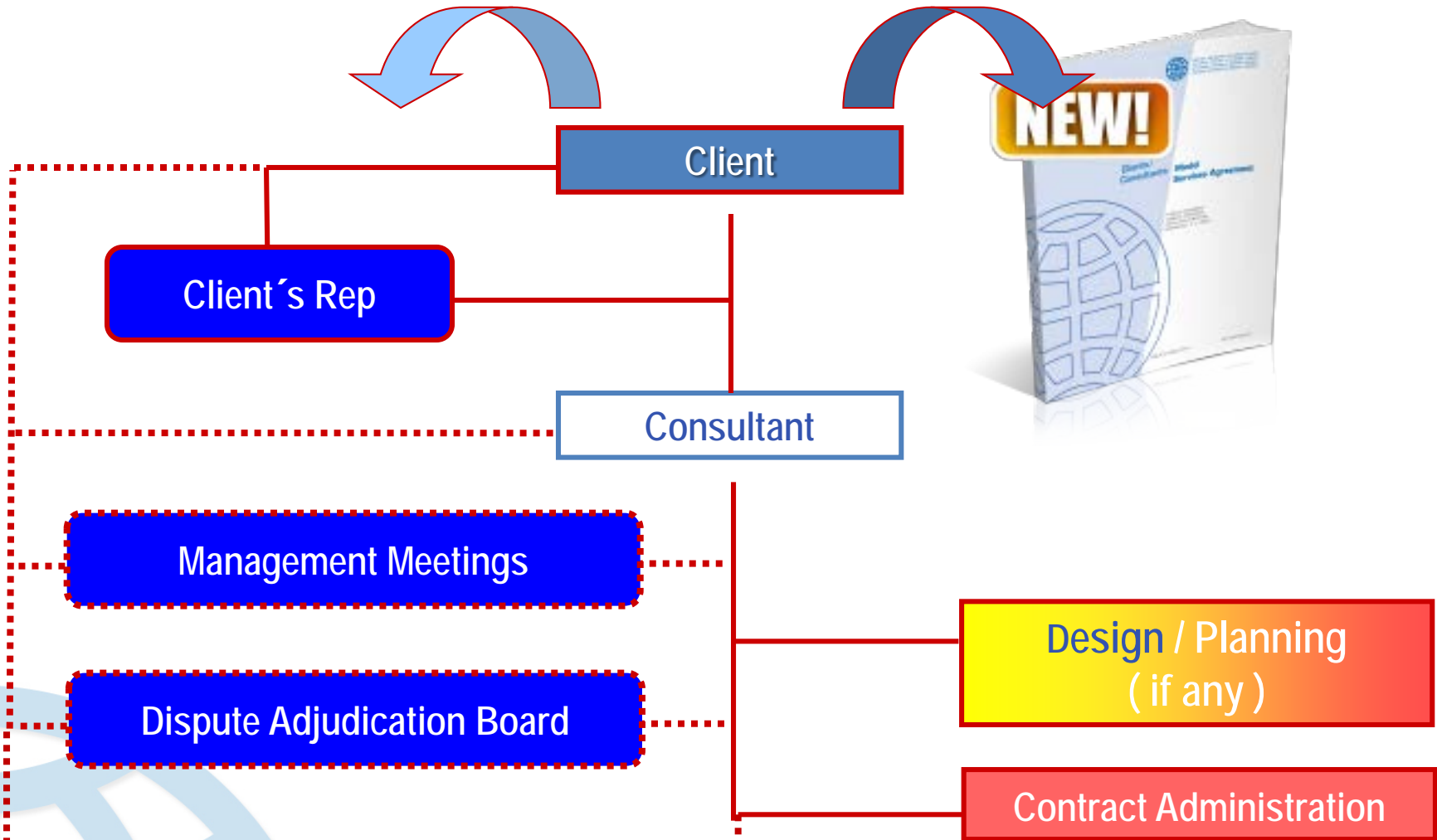
- **Dispute Resolution**



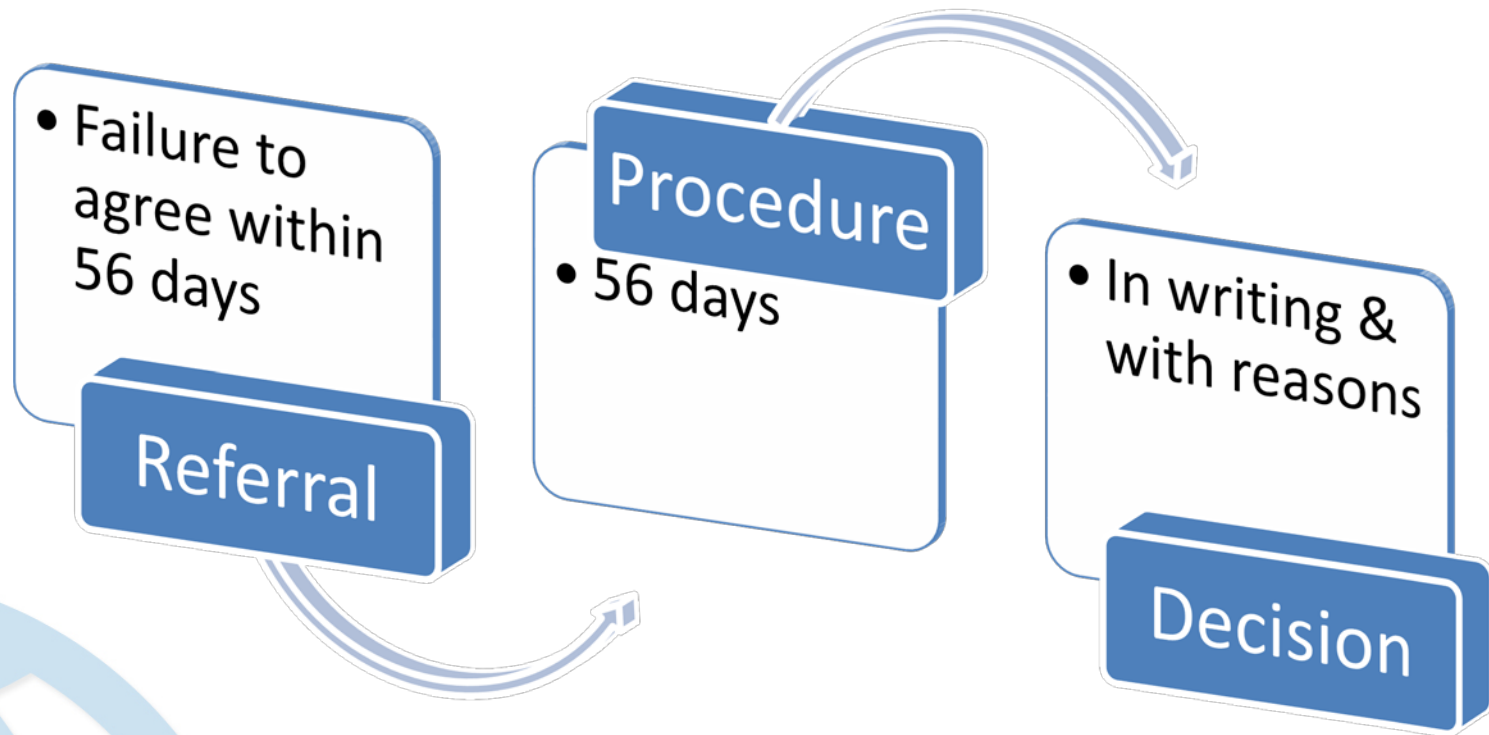
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# WB DAB Procedure





# White Book

- **Other Developments**



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# Other Developments



# Sub-consultancy Agreement

2<sup>nd</sup> Edition – 2017



Intended for use where a Consultant appointed under the **White Book** desires to engage a **Sub-Consultant** to undertake part of the Services / however **also designed for use when head contract is not the White Book** (no *mutatis mutandis* wording + repeat of WB provisions where applicable to Sub-Consultant)

However, if intended for use **when principal contract is not the White Book** care must be taken to adapt & strengthen the **fitness for purpose**

**requirements.** The Sub-consultancy Agreement is not a compliant with the back-to-back approach required under FIDIC D&B contracts.



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# JV Agreement 2<sup>nd</sup> 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





# JV Agreement 2<sup>nd</sup> Edition – 2017

## Assuming that

the lowest level of alliance / cooperation is intended;

individual Members need to agree the allocation among themselves of the obligations and liabilities within the Joint Venture

**Not creating** a legal entity having individual legal capacity, but is an agreement between parties to associate for a specific project.

Each JV Member will typically be jointly and severally responsible and liable for the performance of Services under the main Services Agreement with the Client and for any breach of that agreement.





# Guides

- FIDIC intends to provide the industry with **Guides** on the use **of all** of these Agreements
  - In particular FIDIC plans to publish an updated “**White Book Guide**” which will include commentary on the clauses in the White Book and guidance on completion of the Appendices.
- Users of the White Book in the meantime can refer to various other FIDIC publications available in the FIDIC Bookshop at **www.fidic.org**.



- Those involved in preparing a Scope of Work in Appendix 1 of the White Book may wish to consult the two FIDIC Definition of Services guides.



# New Features / New Demands

- The current FIDIC forms of Contract and Agreements do not refer to Building Information Modelling, abbreviated **BIM**
- Is FIDIC not interested in?
- Far from it the Contracts Committee, the Capacity Building Committee and the Business Practice Committee are currently considering how best to deal with BIM.
- The challenge: FIDIC is used worldwide and legal uniformity is far from being achieved. Moreover diversity in culture exists and business practices and demands are developing very fast.
- This is why the three Agreements in particular do not include special language regarding BIM. FIDIC's approach is more likely to be in the form of a Guidance Note or perhaps a Protocol for use with the FIDIC forms of Contract and Agreement.



# BIM

- **Question**
- On a scale from 1 to 10:
- Is **Building Information Modelling** an important feature in the region which requires contract language?

1. Yes

2. No



## Thank you for your kind attention

