

# The role of the Engineer in FIDIC 2017 contracts

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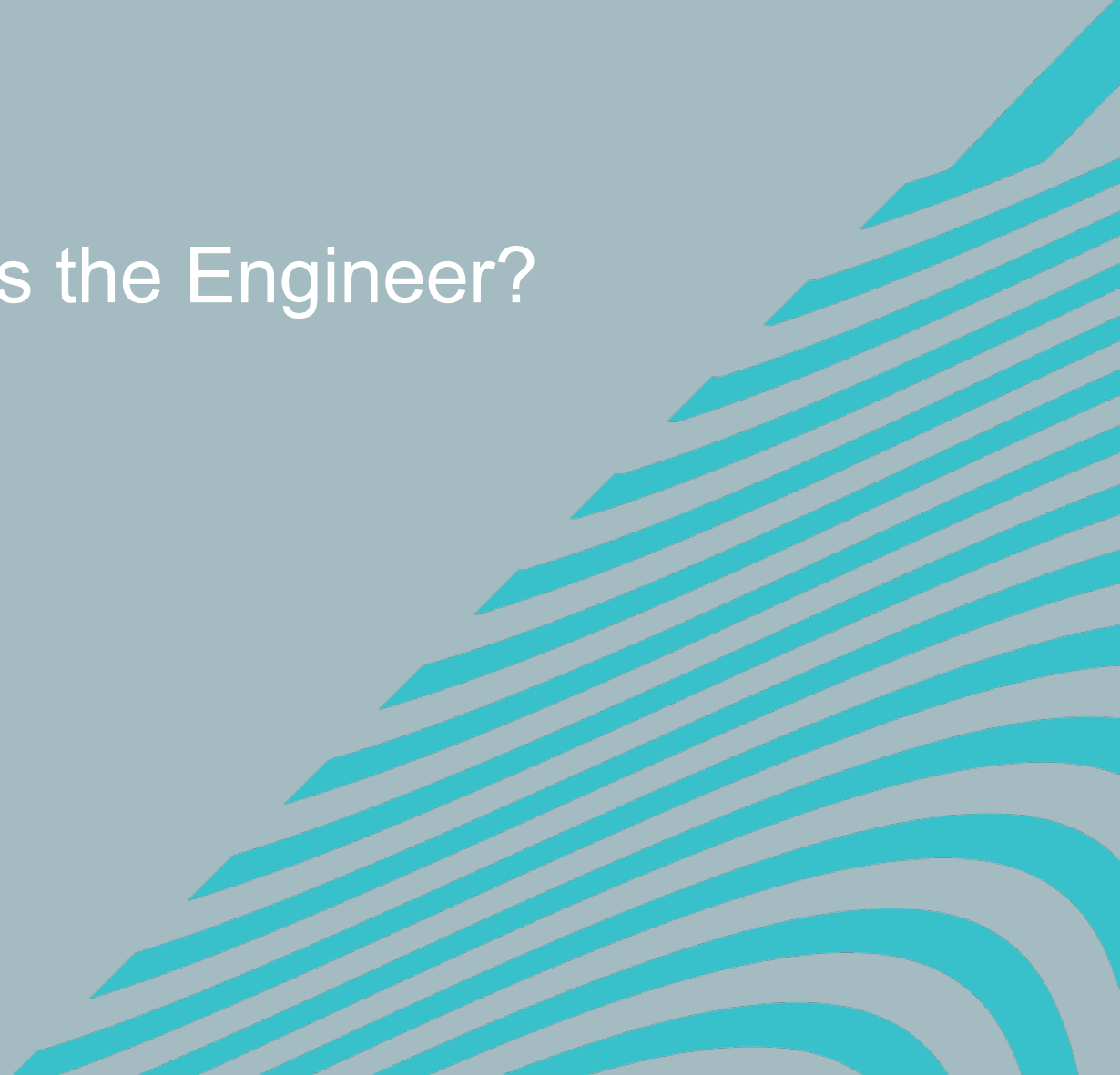
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# Introduction

- Who and what is the Engineer in the FIDIC 2017 Yellow and Red Books?
  - Qualifications?
  - Duties and Authority
  - The Engineer's Representative
  - Can the ER's employee be the Engineer?
- The Engineer's role in contract management:
  - Instructions
  - The Programme as a project tool
  - Meetings and risk management
  - Payment
  - Record requirements
- The Engineer's Determinations
- Time Bars and Deeming Provisions



# Who and what is the Engineer?



# Who is the Engineer?

- Clause 3.1:
  - The Engineer can be a person or “*legal entity*”
    - If a legal entity then a natural person must be appointed to act on its behalf
    - Notice given to Employer and Contractor re who that is
  - Professional engineer having suitable qualifications, experience and competence to act
  - Fluent in the ruling language
  - Difficulties for ERs who would normally appoint PMs who are not Engineers unless the terms are amended

# Duties and Authority

- Clause 3.2:
  - Act as a skilled professional
  - Deemed to act for the ER (unless says otherwise e.g. Clause 3.7)
  - No authority to amend the Contract
  - Can not relieve anyone of any duty, obligation or responsibility under the Contract
  - Particular Conditions should state where ER's consent is required in order for specified power to be exercised
    - Deemed to have been given when he does so
  - No ER consent required to make a Determination
  - Nothing will relieve the Contractor of their obligations under the Contract

# Duties and Authority (2)

- Engineer acts “*neutrally*” when making a determination
  - NOT “*impartially*” or “*independently*”
  - Words chosen to avoid issues in Civil Law jurisdictions
  - This doesn’t apply elsewhere (eg issuing the IPC or FPC)
- No overriding duty to act fairly or treat ER and Contractor equally UNLESS:
  - Implied by the governing law
  - English Law
    - Contract Administrators to act in a fair and unbiased manner
    - *Sutcliffe v Thackrah* [1974] AC 727

# The Engineer's Representative

- 2017 Editions introduced the concept of an Engineer's Representative:
  - Natural person
  - Based at the site the whole time the Works are being executed
  - Engineer can delegate to them
- Reflects the increased focus on project management in the 2017 Editions
- Delegation [Clause 3.4]:
  - Powers can be delegated save for:
    - Determinations [Clause 3.7]
    - Notices to correct [Clause 15.1]

# Can the Engineer be an Employer employee?

- Nothing within the FIDIC form which explicitly prevents this
  - BUT:
    - Provision for express appointment of the Engineer (Clause 3.1)
    - Provision of the replacement of the Engineer (Clause 3.6)
  - Nature of the role:
    - How could an ER employee act “*neutrally*”?
  - Governing Law
    - English case law suggests the employer can NOT assume the role of a construction manager / decision maker
- UNLESS
- express contractual provision
    - *Scheldebouw BV v St James Homes (Grosvenor Dock) Ltd* [2006]
    - *Imperial Chemical Industries v Merit Merrell Technology Ltd* [2017]



# The Engineer's role in Contract Management



# Overview

- Enhanced project management is a feature of the 2017 Editions
- The Engineer / ER needs to be aware of the tools available to him
- Contract imposes:
  - Strict requirements for communicating with the Parties to avoid disputes
  - Strict time limits for actions required by Engineer
- Sophisticated role and sufficient resources required to manage the process

# The Engineer's Duties

- Notifying the Contractor of the commencement date
- Reviewing programmes
- Measuring the works
- Issuing payment certificates
- Issuing Instruction (including for Variations)
- Inspection and testing of the Works
- Issuing notices to correct failures
- Determining reductions in the Contract price for unremedied defects or damage
- Issuing Taking-Over Certificates
- Issuing the Performance Certificate
- Assessing and making fair determination for additional costs and time

# Instruction or a Variation?

- Engineer can issue instructions necessary for the execution of the works [Clause 3.5]
- Contractor to comply UNLESS:
  - A Variation (and the Instruction doesn't say that)
  - Not compliant with applicable Laws, unsafe or impossible
- Contractor to issue a Notice to Engineer:
  - Immediately; AND BEFORE
  - commencing works
- Engineer has 7 days to respond OR:
  - Instruction deemed revoked
- Opportunity for Contractor to challenge Variation by the back door

# The Programme [Clause 8.3]

- Detailed provisions as to the required contents of the as-planned programme
  - Emphasis on early detail
  - Requires collaboration with Subcontractors and suppliers
- Contractor to submit within 28 days of the Notice of Commencement
- Programme to be provided in paper and electronic forms
- Contractor to submit an updated programme:

*“whenever any programme ceases to reflect actual progress or is otherwise inconsistent with the Contractor’s obligations.”*

# The Programme (2)

- Engineer has a duty to Review the programme
- Examination and consideration by the Engineer of a Contractor's submission in order to assess whether it complies with the Contract
- Notice within fixed period or deemed acceptance:
  - 21 days after receiving initial programme
  - 14 days after receiving a revised programme
- Engineer can notify requirement for updated programme:
  - whenever ceases to comply with the Contract
  - Contractor to submit within 14 days of that notice
- Opportunity to ensure programme logic is correct, sensible and create a useful tool to actively monitor and manage progress

# Risk management tools: Advance Warning

- Clause 8.4:
  - Advance warning by Engineer as well as parties of circumstances:
    - Adversely affecting the work of the Contractor's personnel
    - Adversely affect the Works when completed
    - Increasing the Contract Price
    - Delaying the Works
  - Engineer can request proposals to avoid / minimise the effect
    - Clause 13.3.2 [Variation by Request for Proposal]

# Risk management tools: Recovery Programme

- Clause 8.7 IF:
  - Programme is delayed; AND
  - No extension of time is due

THEN

- Engineer can instruct a revised programme
  - Revised methods for expediting progress and completing on time
  - Costs at Contractor's risk
  - Contractor to adopt unless the Engineer notifies otherwise
  - ER can notify a claim for costs if they incur expense as a result
- **Warning:**
  - If the delays are due to matters entitled the Contractor to an EOT:
    - Contractor entitled to costs [Clause 13.3.1]
    - Revised methods = acceleration
- Recipe for disputes if not used properly?



# Risk management tools: Meetings

- Clause 3.8:
  - The Engineer can require attendance at meetings
    - The Contractor's Representative
    - Other contractors, subcontractors, suppliers
  - The Engineer should keep records and supply them to others in attendance
  - Actions noted but must be in accordance with the Contract

# Risk management tools: Records

- Clause 20.2.3
- Engineer may :
  - Monitor Contractor's contemporary records after events giving rise to a claim
  - Instruct Contractor to keep additional records
  - Inspect those records (during normal working hours or as agreed)
  - Ask for copies
- No implied acceptance as a result of inspecting the records
- ER:
  - Useful tool to monitor the validity of claims / quantum or length of delays
- Contractor:
  - Agree the format of records and get the ER's buy in
  - Harder to reject the claim later!

# Payment (1)

- Much more involved role in the payment provisions than in previous editions
- Applications for payment (the Statement) shall
  - *“be in a form acceptable to the Engineer”*
- Engineer can agree / determine revised instalments IF:
  - Instalments are not defined by reference to the actual progress achieved in the execution of the Works; AND
  - Actual progress differs from that on which the Schedule of Payments is based
- Engineer must give reasons and details of its calculations if it withholds any payment from the Contractor from its Interim Payment Certificates [Clause 14.6.2]

# Payment (2)

- Withholding payments from IPC [Clause 14.6.2]:
  - Engineer must give reasons and details of its calculations
- Provision for challenging “*errors*” under Clause 14.6.3:
  - Engineer may correct or modify errors in the next IPC
  - Contractor can challenge anything withheld in the next Statement
  - Contractor may refer the matter by giving a Notice under Clause 3.7

# The Engineer's Determination



# Engineer's Determination (1)

- In the 2017 Yellow Book, new Sub-Clause 3.7, “*Agreement or Determination*”, replaces Sub-Clause 3.5 in the 1999 Yellow Book
- Sub-Clause 3.7 details the procedure the Engineer must follow in agreeing or determining:
  - Time and/or money Claims (under clause 20.1(a) and (b))
  - Claims for another entitlement or relief (not time or money) (under clause 20.1(c))
    - *Note: This is a new provision in the 2017 suite. The Parties can no longer refer this type of Claim directly to the DAAB/DAB for a decision as under the 1999 suite*
  - Any matter that the Contract expressly provides is to be referred to the Engineer

# Engineer's Determination (2)

- New Sub-Clause 3.7:
  - Retains (and substantially expands upon) the obligation on Engineer to consult with the parties in an endeavour to reach agreement
  - Much longer Sub-Clause
  - Significant amendments
  - More detailed procedure
  - Additional time limits on the Engineer when agreeing or determining any matter or Claim
- Aim is to resolve disputes between the parties at an earlier stage, so as to avoid the need for a DAAB decision and/or an arbitral award

# Engineer's Determination (3)

- Sub-Clause 3.7 consists of five sections:
  - 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



# Engineer's Determination (4)

## Sub-Clause 3.7.1 – Consultation to reach agreement

- New requirements to:
  - consult with the parties jointly and/or separately
  - encourage discussion between the parties in an endeavour to reach agreement
  - commence any such consultation promptly to allow adequate time to comply with a new **42-day time limit** for agreement under new Sub-Clause 3.7.3, and
  - provide the parties with a record of the consultation (unless the Engineer proposes otherwise and the parties agree)

# Engineer's Determination (5)

## Sub-Clause 3.7.1 – Consultation to reach agreement

- **If agreement reached** within time limit:
  - Engineer issues “*Notice of the Parties’ Agreement*”
- **If no agreement reached** within time limit:
  - Engineer issues “*Notice of no agreement*”, and
  - Immediately proceeds with Engineer’s Determination under Sub-Clause 3.7.2

# Engineer's Determination (6)

## Sub-Clause 3.7.2 – Engineer's Determination

- The Engineer shall make a fair determination of the matter or Claim, in accordance with the Contract, taking due regard of all relevant circumstances
- Within the **time limit** for determination under Sub-Clause 3.7.3 (i.e. **42 days**, unless Engineer proposes (and the parties agree) otherwise), the Engineer shall give a Notice to both Parties of his/her determination
- This Notice shall:
  - state that it is a “*Notice of the Engineer's Determination*”, and
  - describe the determination in detail with:
    - reasons, and
    - detailed supporting particulars

# Engineer's Determination (7)

## Sub-Clause 3.7.3 – Time limits

- If the Engineer does **not** give the Notice of agreement or determination within the relevant time limit:
  - in the case of a **Claim**, the Engineer shall be deemed to have given a determination rejecting the Claim, or
  - in the case of a **matter to be agreed or determined**, the matter shall be deemed to be a Dispute:
    - Dispute may be referred by either Party to the DAAB for its decision without the need for a NOD (Sub-Clause 21.4), and
    - Sub-Clause 3.7.5 [*Dissatisfaction with Engineers determination*] and subparagraph (a) of Sub-Clause 21.4.1 [*Reference of a Dispute to the DAAB*] shall not apply

# Engineer's Determination (8)

## Sub-Clause 3.7.4 – Effect of the agreement or determination

- Parties and Engineer have a **14-day window** to identify “*any error of a typographical or clerical or arithmetical nature*” in the Engineer’s Notice of agreement or determination
- **Within 7 days** of finding (or being notified of) the error, the Engineer shall give a Notice to both Parties of the corrected agreement or determination.
- Thereafter, the corrected agreement or determination shall be treated as the agreement or determination for the purpose of the Conditions

# Engineer's Determination (9)

## Sub-Clause 3.7.4 – Effect of the agreement or determination

- If either Party is dissatisfied with a determination of the Engineer then it must:
  - give a Notice of Dissatisfaction (**NOD**) within 28 days after receiving Notice of the determination

Otherwise:

- the determination is deemed to have been accepted by both parties, and
  - is final and binding on them
- Aim is to ensure that Claims and Disputes are dealt with as they arise, rather than being left until the end

# Engineer's Determination (10)

- Important to comply with contractual requirements for giving Notices and other types of communication!
- See Clause 1.3 - Notices and Other Communications. In particular:

*“Where these Conditions state that a Notice or NOD or other communication is to be delivered... it shall have effect when it is **received (or deemed to have been received)** at the recipient’s current address*

...

*An electronically transmitted Notice or other communication is deemed to have been received **on the day after transmission**, provided no non-delivery notification was received by the sender.”*

# Engineer's Determination (11)

- Recourse to the DAAB is much more tightly controlled under the 2017 suite
- A Dispute does not arise under the Contract unless and until the clause 3.7 process for agreeing and determining Claims has been completed, and then only if:
  - a NOD with the Engineer's determination has been given within the required period

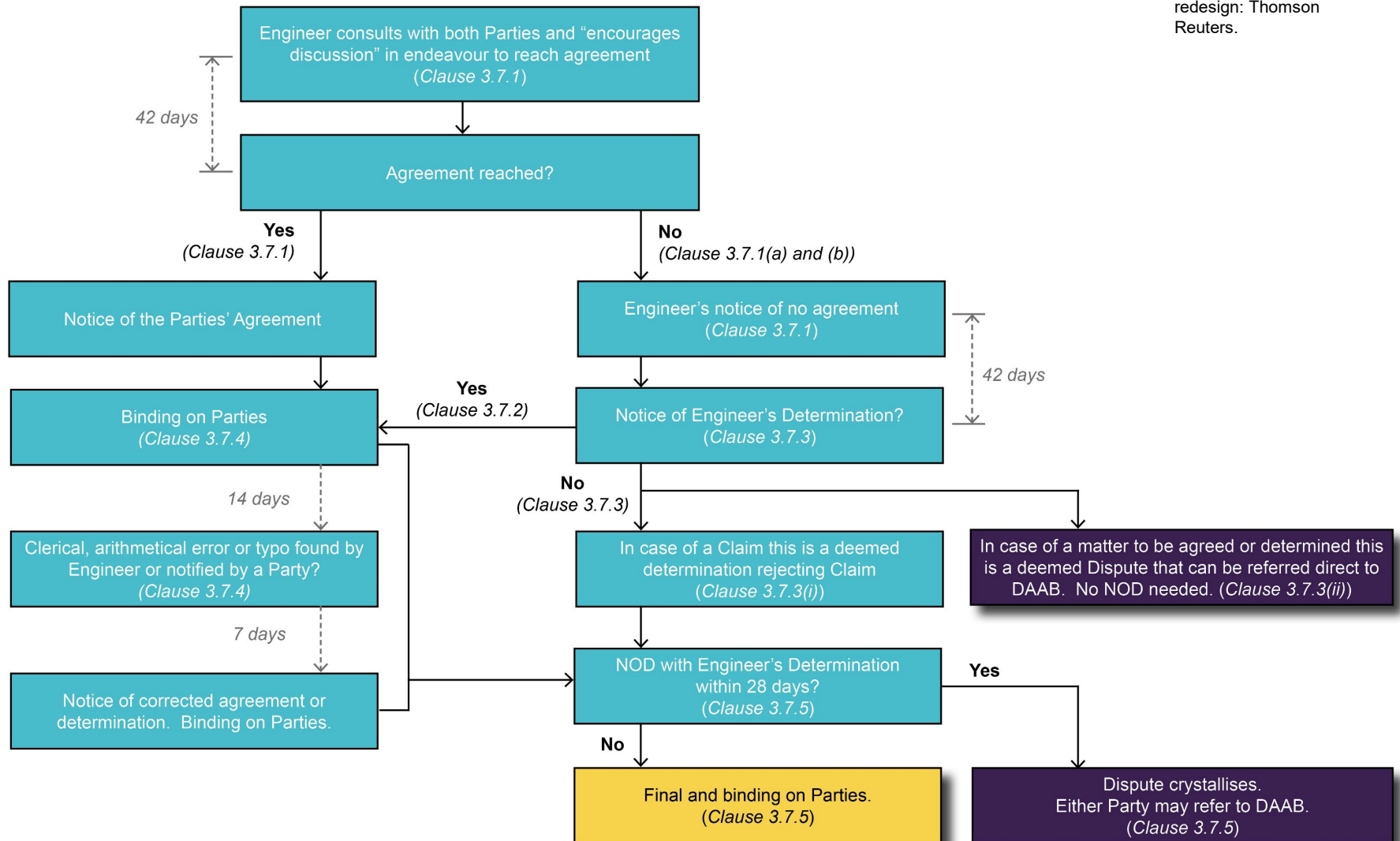
**OR**

- the Engineer fails to give Notice of its determination in relation to a *"matter to be agreed or determined under the Contract"* within the required period



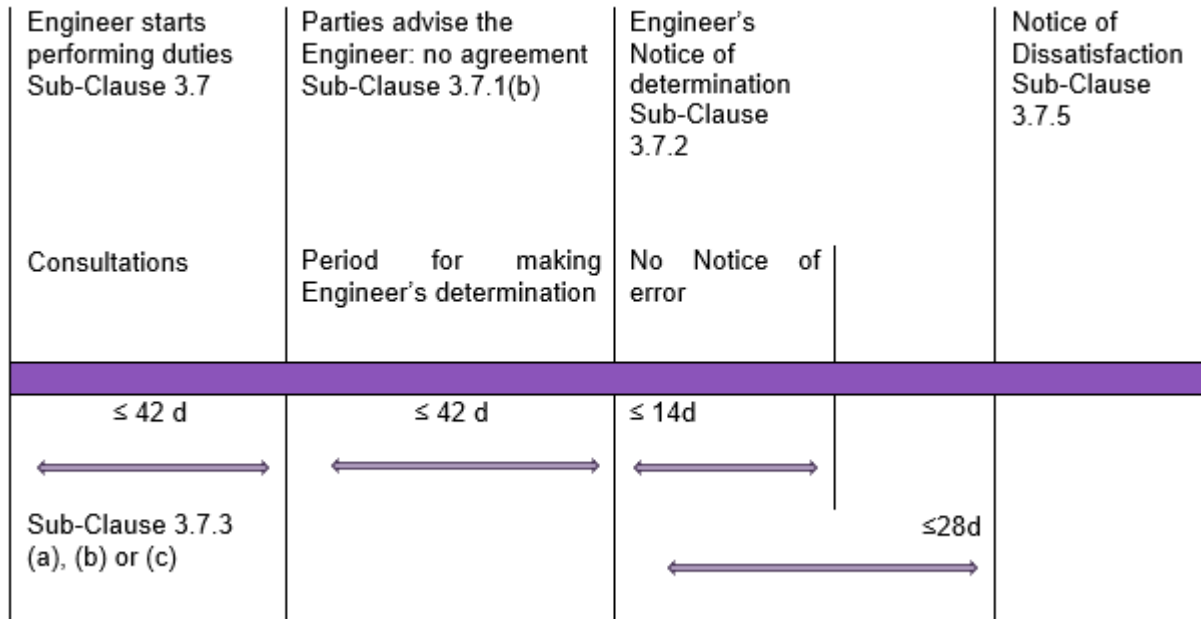
# Engineer's Determination (12)

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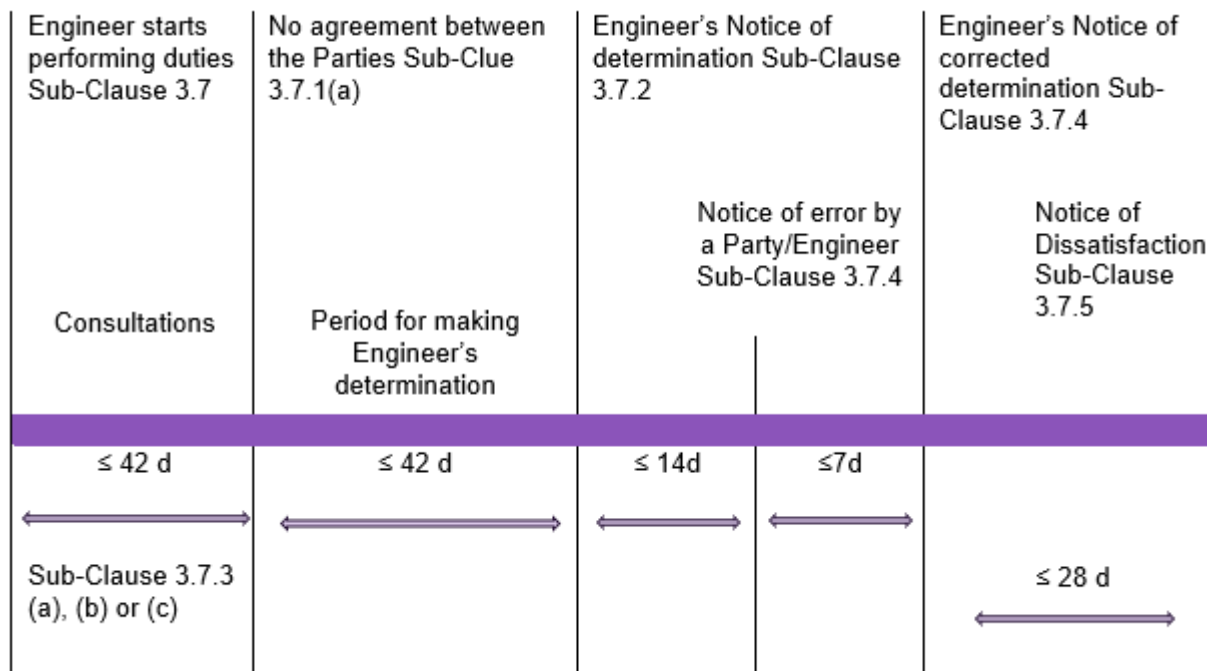


# Scenario 2



- The Parties' early advice is that agreement cannot be reached and so Engineers' determination is necessary
- No error in Engineer's determination

# Scenario 3



- No agreement within 42 days
- Engineer determines within 42 days
- Error found in the Engineer's determination and corrected

# Time Bars (1)

- Important to differentiate between time limits and time-bars:
  - Time limits are just a limit, or a period of time in which a Party should act.
  - A time-bar is a period of time in which a Party must act and if it does not do so, it loses certain rights.
- The 2017 suite contains **five** time-bars that relate to the Claims and dispute resolution process. (There are other time bars re other topics.)

# Time Bars (2)

If a Party fails to comply with the relevant time period in...	Then:	Comment
...notifying an initial Claim,	the Claim may be rejected (clause 20.2.1).	May be waived by the Engineer in extenuating circumstances (clause 20.2.2)
...providing a statement of the contractual and/or other legal basis as part of its fully detailed Claim,	the Notice of Claim is deemed to have lapsed and is no longer valid.	New time-bar May be waived by the Engineer in extenuating circumstances (clause 20.2.4)
...giving a NOD in respect of the Engineer's determination,	the determination becomes final and binding and is deemed accepted by the parties (clause 3.7.5).  It cannot be referred to the DAAB for a decision.	New time-bar  Cannot be waived

# Time Bars (3)

If a Party fails to comply with the relevant time period in...	Then:	Comment
...referring a dispute to the DAAB after giving or receiving a NOD in respect of the Engineer's determination,	the NOD is deemed to have lapsed and is no longer valid.	New time-bar Cannot be waived
...giving a NOD in respect of a DAAB decision,	the decision becomes final and binding and neither Party is entitled to commence arbitration in relation to that Dispute.	Features in 1999 suite Cannot be waived

# Deeming Provisions (1)

- Time limits under the 2017 suite are often used in conjunction with deeming provisions:
  - a failure to comply with the relevant time limit "*deems*" a consequence
- Several new "*deeming provisions*" in the 2017 suite
- FIDIC's view is that these more detailed provisions will:
  - Provide more support for less experienced contract users
  - Help the parties better understand what is required of them
  - Be easier to interpret with less scope for argument
  - Result in fewer disputes over the life of the project



# Deeming Provisions (2)

New deeming provisions relevant to the Engineer include:

- if the Engineer does not respond within 14 days to the Contractor's proposal for remedial work in respect an item of Plant, Materials, design or workmanship which the Engineer had previously notified as being defective or otherwise not in accordance with Contract, the Engineer is deemed to have given a Notice of No-objection (clause 7.5)
- if the Engineer does not, within 21 days after receipt of the initial programme or within 14 days after receipt of a revised programme give a Notice stating that the programme was non-compliant or did not reflect actual progress or was otherwise inconsistent with the Contractor's obligations, the Engineer is deemed to have given Notice of No-objection and the initial programme or revised programme (as the case may be) shall be the Programme (clause 8.3)

# Deeming Provisions (3)

- if the Engineer fails to give a Notice of non-compliance within 14 days requiring the Contractor to revise his proposed test programme (for tests on completion) accordingly, the Engineer is deemed to have given a Notice of No-objection (clause 9.1)
- if the Engineer, following Review of a certified report of the test results provided by the Contractor, fails to give Notice of results not complying with Contract within 14 days, the Engineer is deemed to have given a Notice of No-objection (clause 9.1)
- if the Engineer fails to respond within 7 days to a quotation for a Provisional Sum submitted by the Contractor, such quotation having been requested by the Engineer, the Contractor is entitled to accept such quotation (clause 13.4)

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Questions?  
Thank you.

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