



WORLD BANK GROUP



MWH®

# Hydro Asia 2016

Training Course on

## Contracts Management

## and the Practical Use of

FIDIC Conditions of Contract in the Hydropower  
Construction Industry



## Session 4

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Sunday February 28 and Monday February 29, 2016

VIENTIANE, LAOS

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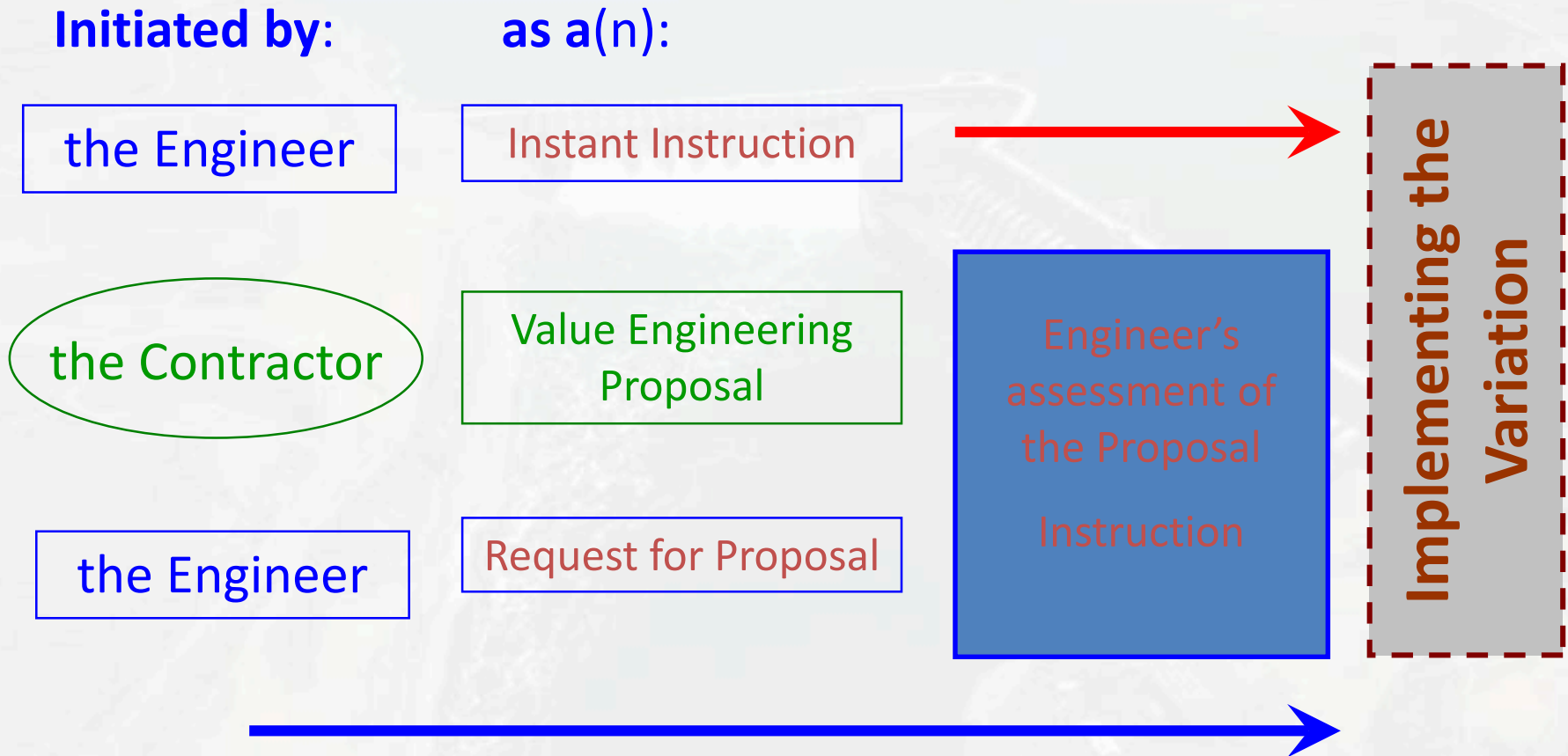
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# 1. Variations and Adjustments

## » Variations – the Summary Chart



# 1. Variations and Adjustments

- » The **Contractor shall execute and be bound by each Variation**, unless the Contractor promptly gives notice, that he cannot readily obtain the Goods required for the Variation. (Supporting particulars shall be provided!)
- » Upon receiving this notice, the Engineer shall
  - **cancel**,
  - **confirm** or
  - **vary** the instruction.
- » The Contractor shall not make any alteration and/or modification of the **Permanent Works**, unless and until the **Engineer instructs or approves a Variation**.



# 1. Variations and Adjustments



- » Each Variation may include (in addition to definition 1.1.6.9 and in the **Red Book only!**):
- (a) **changes to the quantities** of any item of work included in the Contract (however, such changes do not necessarily constitute a Variation),
  - (b) **changes to the quality** and other characteristics of any item of work,
  - (c) **changes to the levels, positions and/or dimensions** of any part of the Works,
  - (d) **omission of any work** unless it is to be carried out by others,
  - (e) any **additional work, Plant, Materials or services** necessary for the Permanent Works, including any associated Tests on Completion, boreholes and other testing and exploratory work, or
  - (f) changes to the sequence or timing of the execution of the Works.

# 1. Variations and Adjustments

- » The **Contractor may**, at any time, **submit** to the Engineer a written **proposal** which (in the Contractor's opinion) will, if adopted:
- **accelerate** completion,
  - **reduce the cost** to the Employer of executing, maintaining or operating the Works,
  - **improve the efficiency or value** to the Employer of the completed Works, or
  - **otherwise be of benefit** to the Employer.

This is called „**Value Engineering**” [S-CI 13.2]

In case of saving: 50-50% between Employer / Contractor  
(**Red Book only!**)



# 1. Variations and Adjustments

## ► Provisional Sums

... are used in whole or in part **in accordance with the Engineer's instructions**, and the Contract Price shall be adjusted accordingly.

- » Such Engineer's instructions may cover:
  - **work** to be executed,
  - **Plant, Materials or services** to be purchased by the Contractor (also from a Nominated Subcontractor).
- » The Contractor shall produce **quotations, invoices, vouchers and accounts or receipts** in substantiation.

# 1. Variations and Adjustments

## ► Daywork

- » For **work of a minor or incidental nature Daywork** instructed by the Engineer is applied.
- » The Daywork must be:
  - Instructed as a **Variation**,
  - valued in accordance with the **Daywork Schedule included in the Contract.**
- » The Contractor shall deliver **each day** to the Engineer **accurate statements** including **details** of the resources used in executing the previous day's work.



# 1. Variations and Adjustments

## ► Adjustments

- » The **Contract Price shall be adjusted** to take account of any **increase or decrease in Cost** resulting from a **change in the Laws of the Country** (including the introduction of new Laws and the repeal or modification of existing Laws) or in the judicial or official governmental interpretation of such Laws, **made after the Base Date**, which affect the Contractor in the performance of obligations under the Contract.
- » The Contractor's entitlements can be: **EoT & Costs** (**no profit!**).

# 1. Variations and Adjustments

## ► Adjustments

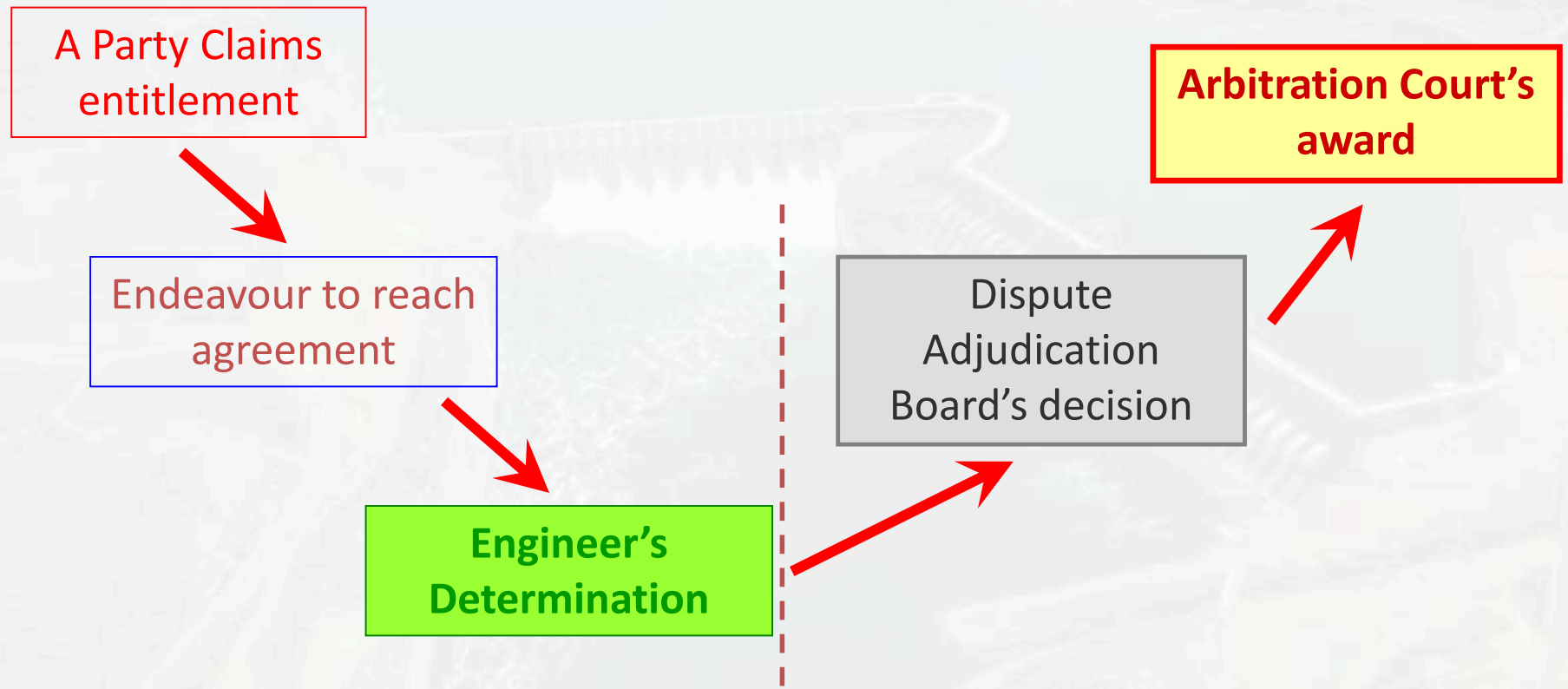
- » The **Contract Price** may also be adjusted to take account of any **changes in Cost**.
- » The amounts payable to the Contractor shall be adjusted for **rises or falls in the cost of labour, Goods and other inputs** to the Works, by the addition or deduction of the amounts determined by the formulae prescribed in the Appendix to Tender.
- » If **no formulae** is given in the Appendix to Tender, there **shall not be any adjustment to the Contract Price!**
- » This feature shall be used in case of **longer projects**, where there is considerable **inflation** in the Country (and the Contract Price is payable in the local currency).

## 2. Claims – the Key Features

- » In the 1999 Edition Books, **both** the Contractor AND the Employer **may have claims**.
- » Claiming is the way, how a Party can materialise his **entitlement under the Contract**.
- » In addition to claims under the Contract, there might be **legal claims** as well (e.g. typically indemnification claims – not entirely covered by the Contract – depending upon the Law of the Contract).
- » Claims shall also be under the control, and be managed by, **the Claimant**.

## 2. Claims – the Key Features

### ► The Claims' Lifecycle (turning to dispute)



## 2. Claims – the Key Features

### ► What can the Parties claim for?

#### The Employer

- Extension of Defects Notification Period
- Cost



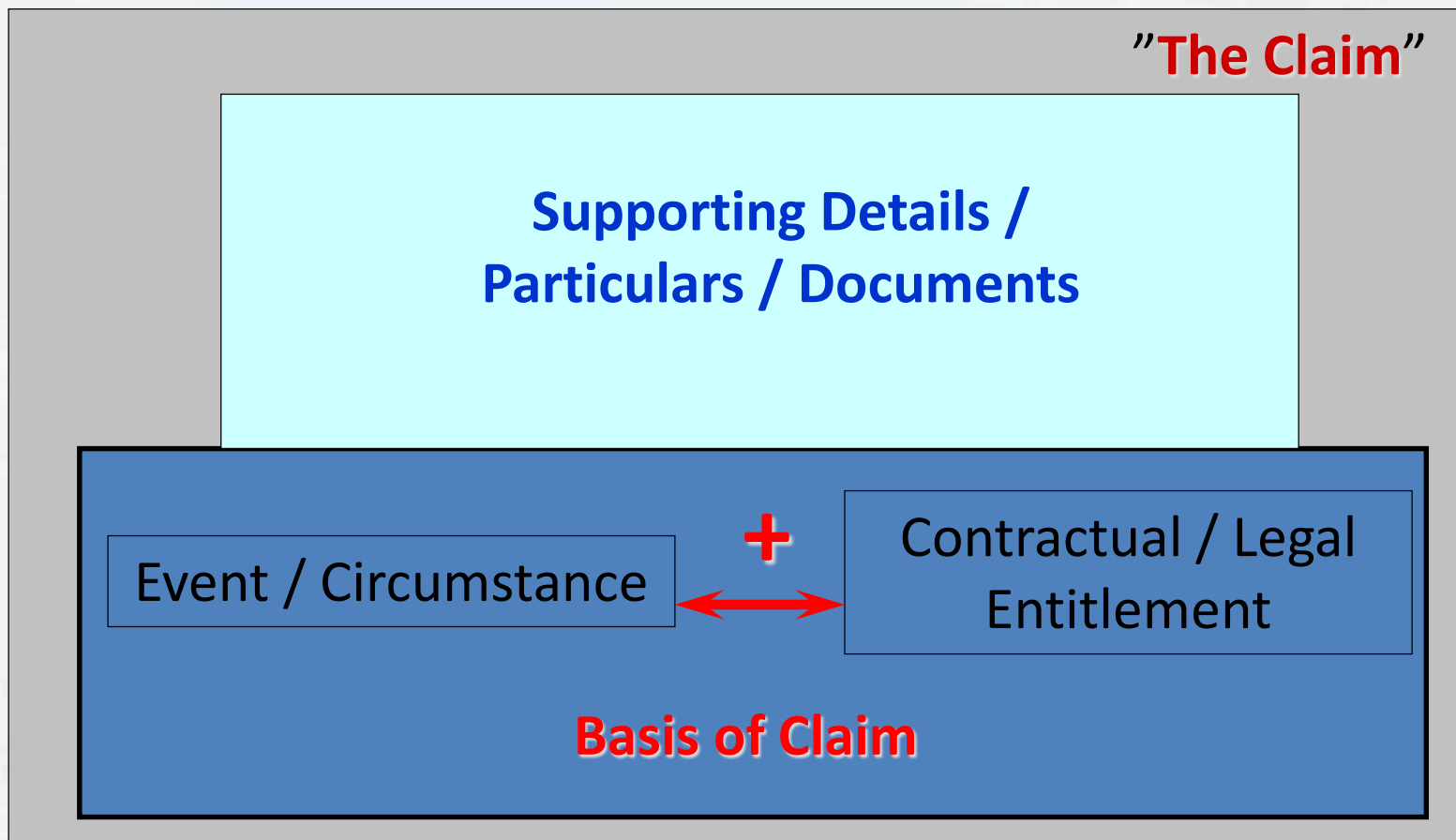
#### The Contractor

- Extension of Time for Completion
- Cost
- Profit (*in certain situations*)



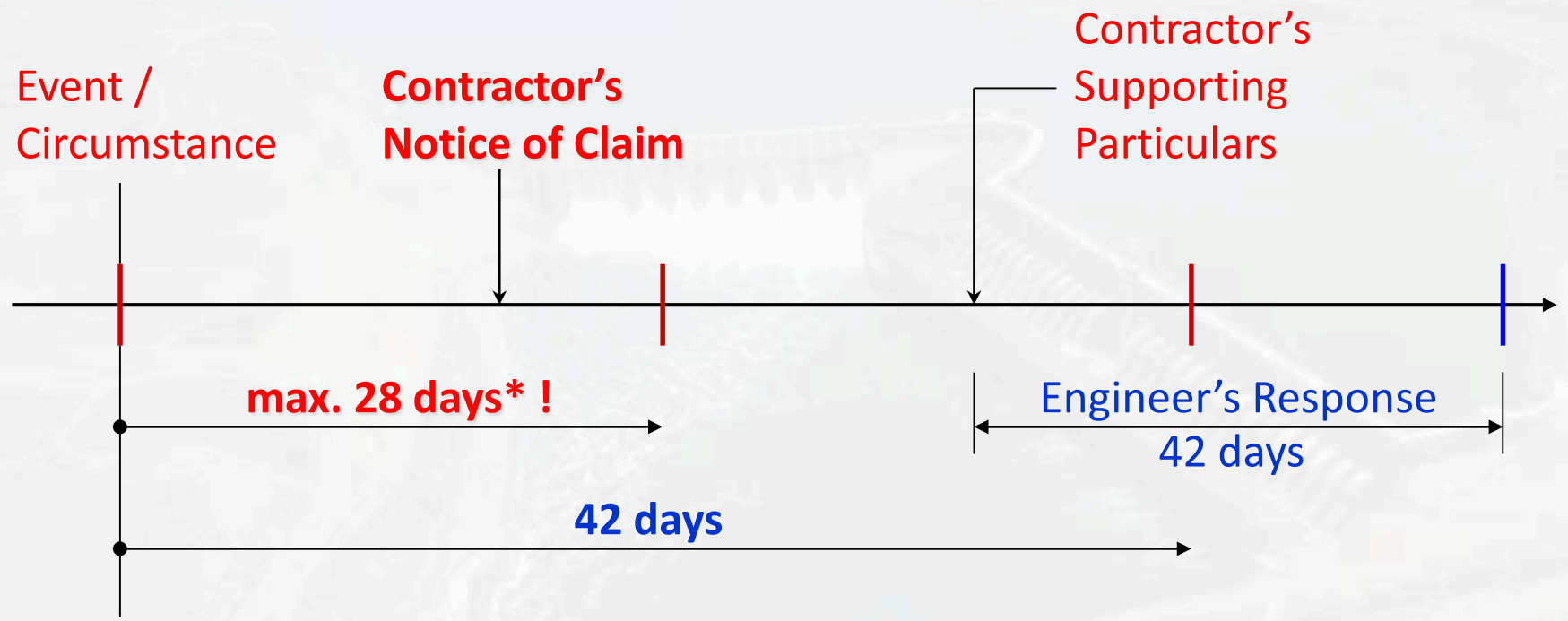
## 2. Claims – the Key Features

### ► The Structure of Claims



# 2. Claims – the Key Features

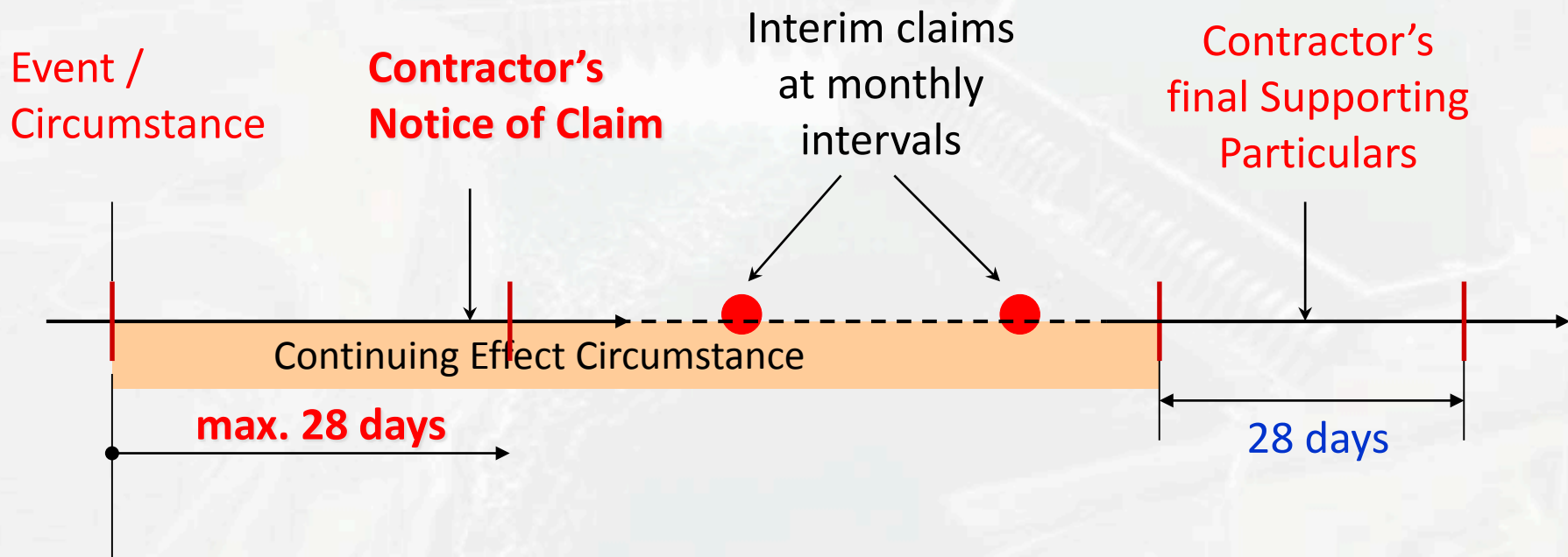
## ► The Claims Timeline (Contractor!)



**\* ONLY the Contractor's Notice of Claim is Time barred !**

## 2. Claims – the Key Features

### ► The Claims Timeline (Contractor – continuing effect)



## 2. Claims – the Key Features

- ▶ **Employer's Claims [S-CI 2.5]**
  - » **Entitlement: under any Clause of the Conditions of Contract or otherwise in connection with the Contract.**
  - » **No time bar** for the notice! (The notice shall be given as soon as practicable - can be given either by the Employer or by the Engineer).
  - » The particulars shall specify the **Clause or other basis** of the claim, and shall include **substantiation** of the amount and/or extension.
  - » **Potential battlefield area: the Engineer's involvement!**

## 2. Claims – the Key Features

### ▶ Contractor's Claims [S-CI 20.1]

- » The Contractor's notice of claim shall be served within 28 days time bar!
- » The Contractor shall keep **contemporary records**, with all **relevant details** supporting and substantiating the claim (**aim**: record "obvious" facts as well - in order to provide **full documented evidence** for later audits!).
- » The Engineer shall have **access to these contemporary records** at all reasonable times.
- » The Contractor shall give **timely notice** (with reasons), if substantiation cannot be completed and **submitted within 42 days!**



## 2. Claims – the Key Features

### ▶ Contractor's Claims – EoT Claims

» Contractor's claims for **Extension of Time for Completion** have always special features.

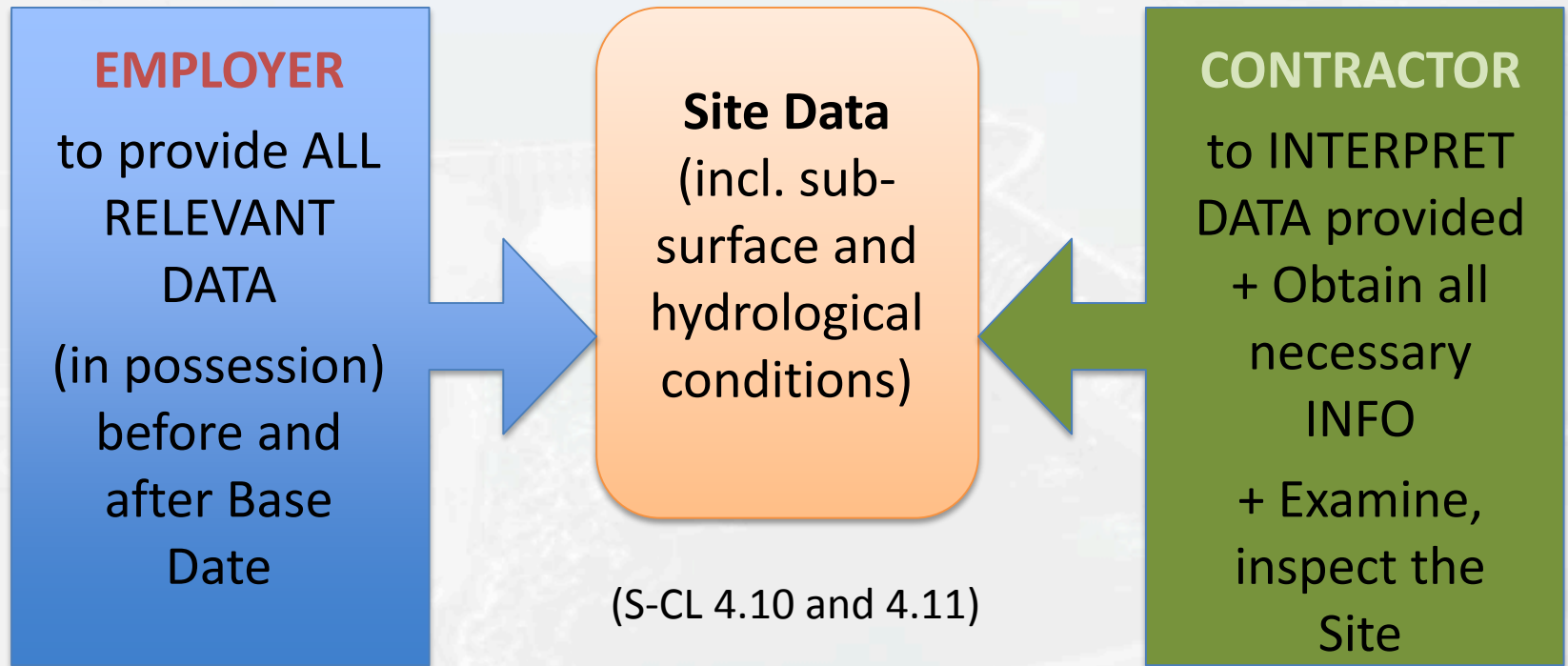
» **Not all delaying events result in need of EoT!**

Therefore: it is expected that Contractor's submit a **current Programme** prepared with the application of **Critical Path Method**.

**REMEMBER**: EoT-s very often result in **payment of related costs** to the Contractor – however, **this is not applicable to each EoT entitlement** according to FIDIC!

### 3. A Typical Case: Differing Site Conditions

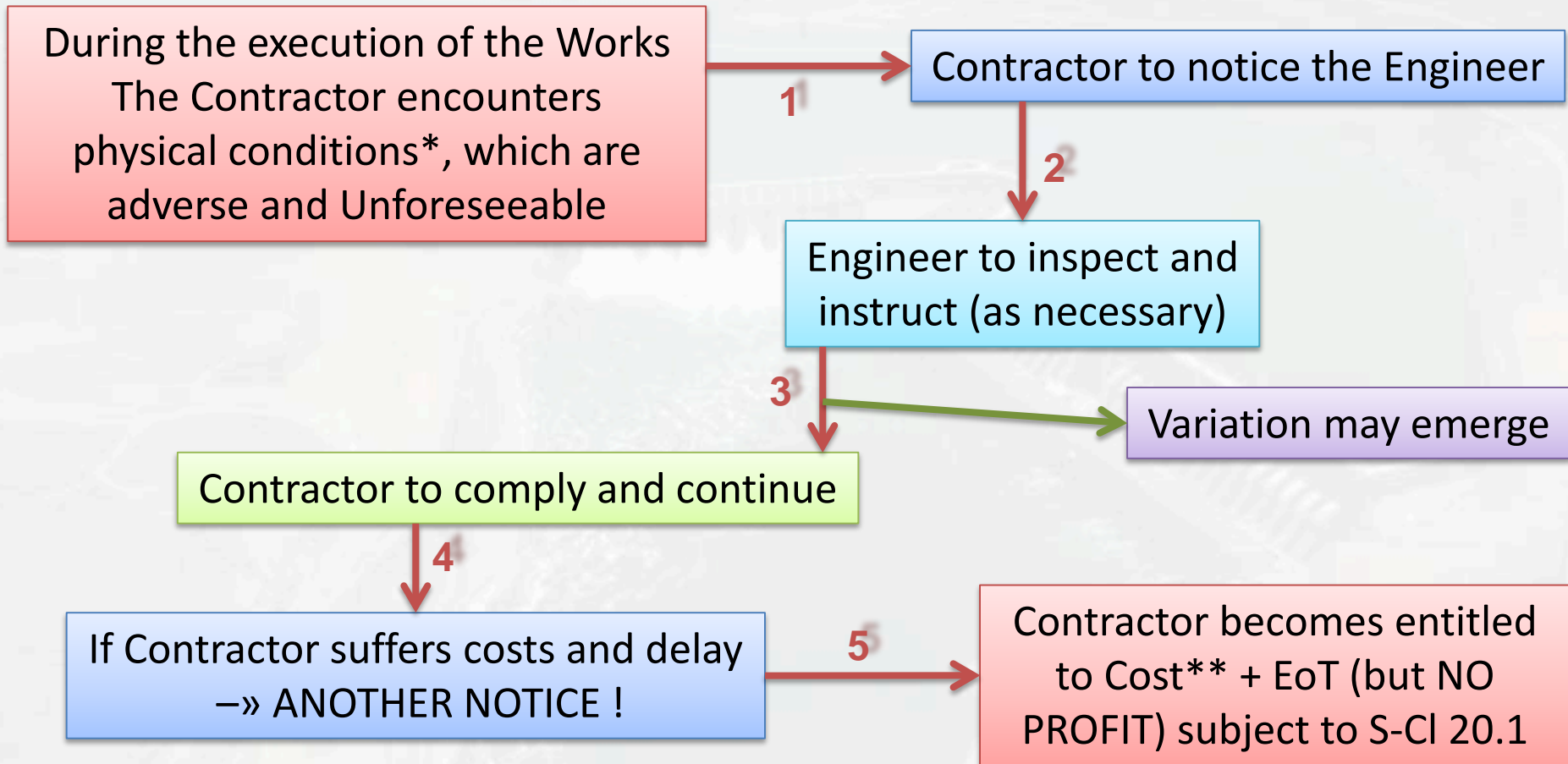
► **Presumptions (basic obligations)**



**YET DIFFERING SITE CONDITIONS  
MAY ENCOUNTER !**

# 3. A Typical Case: Differing Site Conditions

## ► Unforeseeable Physical Conditions (S-CI 4.12)

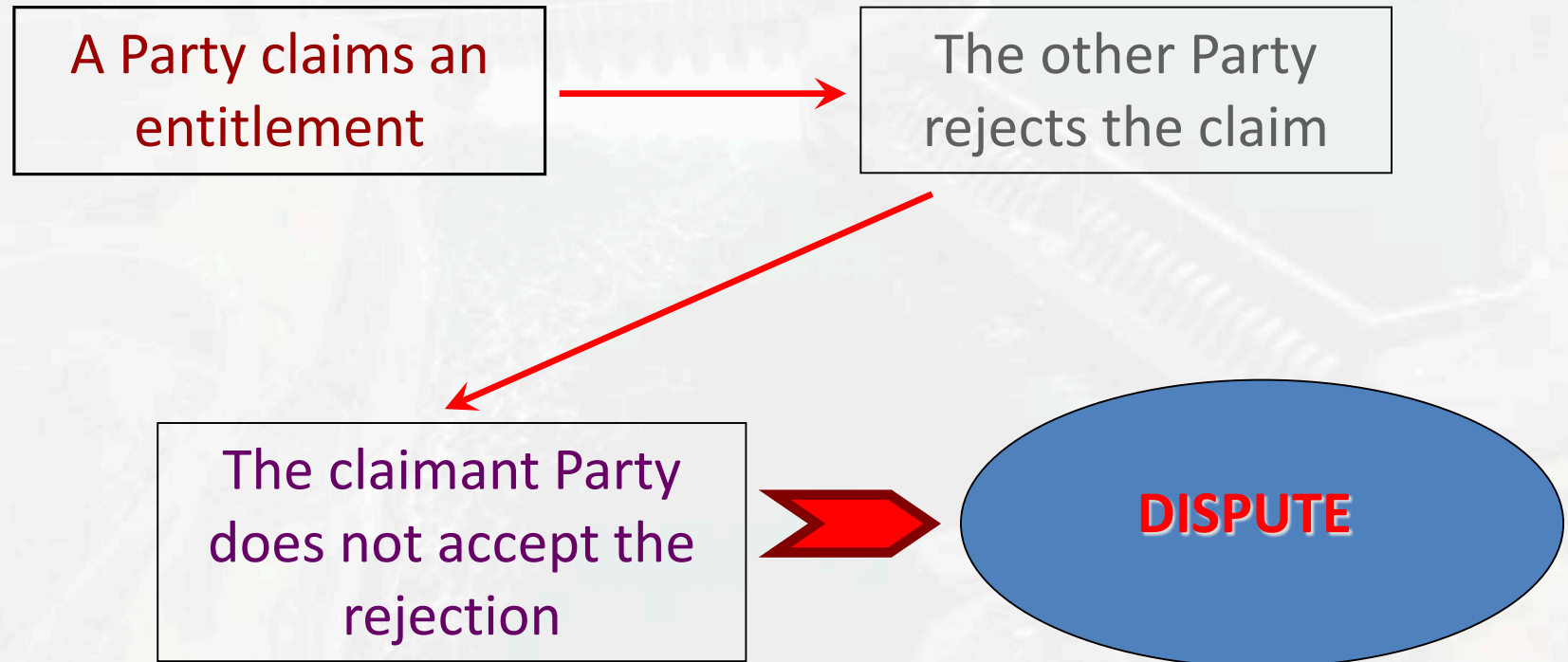


\* NOTE: “physical conditions“ is restricted !

\*\* Maybe ZERO !


## 4. Management of Disputes

- » The "*Dispute*" is an **undefined term** in the 1999 editions FIDIC Conditions of Contract (the DBO Form has this definition already).



## 4. Management of Disputes

### ► The DAB – Basic features

- » The DAB-s are constituted of **3 persons** OR a **single person** called "Adjudicator".
- » The DAB's operation can be **permanent** OR **Ad-hoc**. 
- » In case of a 3 person DAB, the **Parties delegate 1 member each**, the third member is proposed by the accepted delegated 2 members. The **third member** once accepted by the Parties shall serve as the "**Chairman**".
- » All the DAB **members** shall be **accepted by the Parties!**
- » In lack of agreeing the members, an **appointing body** shall delegate the members. The **delegation is binding!**
- » The members' remuneration is paid by the Parties **half** each.

The DAA and the Procedural Rules are included in the FIDIC Books «– each stakeholder shall comply!



## 4. Management of Disputes

### ► The DAB – The Adjudicators

- » Basically, anybody may serve as an adjudicator (theoretically) – **Substantial requirements**:
  - **Deep knowledge of FIDIC** conditions of contracts
  - **Experience** regarding the **technical nature** of the project
  - **Impartiality** (regarding the Parties).
- » FIDIC maintains a so called „**President’s list**” of dispute adjudicators – from which list the Parties may select **international (senior) dispute adjudicators** (currently, there are 63 adjudicators listed):

**<http://fidic.org/president-list>**

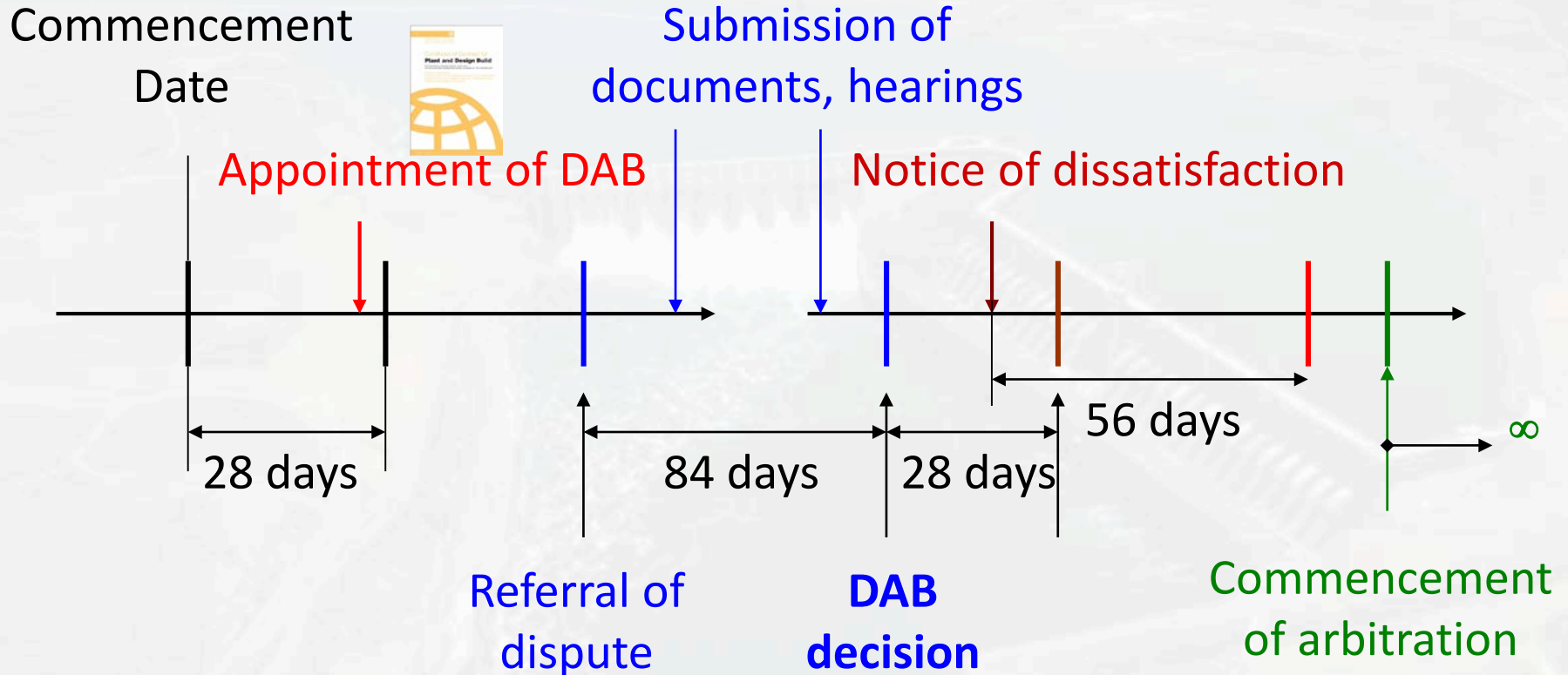
- » The question of **Engineer vs. Lawyer?**

## 4. Management of Disputes

- » The DAB's decision is **immediately binding** after being released to the Parties – so **they have to comply** with it!
- » However, the decision is **not final at that time**.
- » **Unless** any of the Parties notify his **dissatisfaction within 28 days** of the decision, **it becomes final** with the expiry of this period.
- » If any of the Parties notifies his dissatisfaction within this period of 28 days, the **decision will not become final** (but it is still binding).
- » This means the **dispute may be settled by arbitration**.
- » Arbitration **may not commence earlier than 56 days** after the dissatisfaction is notified.

# 4. Management of Disputes

▶ The dispute adjudication timeline [1999 **Red Book**]



## 4. Management of Disputes

### ▶ The advantages of DAB-s

#### » The TIME factor

- There is **no long lasting, infinite** dispute solving procedure,
- DAB **decision** is made within definite, relatively **short period of time** (84 days),
- **Performance** of the Contract **is not ceased** – it is running **parallel** to the dispute resolution.

## 4. Management of Disputes

### ▶ The advantages of DAB-s

#### » The PROFESSIONAL factor

- The dispute is resolved by **experienced professionals** (mainly engineers),
- The **dispute resolution is not started from “zero knowledge”** (see standing DAB in case of Red Book projects),
- The **Parties’ trust and discretion** (DAB-s are more efficient than arbitration in this respect).



## 4. Management of Disputes

### ▶ The advantages of DAB-s

#### » The COST factor

- A DAB procedure **can be budgeted well.**
- **Costs are shared** between the parties in **50-50%** proportion.
- A DAB procedure is **considerably cheaper** than arbitration.

## 5. Suspension, Termination

- » In FIDIC contracts both **Party is entitled to terminate** the Contract, provided the actual conditions enable this termination.

### Contractor's entitlements:

- Reducing the rate of work
- Suspension of work
- Termination of the Contract  
(for contractual reason)

### Employer's entitlements:

- Termination of the Contract  
(for contractual reason)
- Termination for convenience

## 5. Suspension, Termination

### » If

- the Engineer **fails to certify** an IPC, OR
- the Employer **fails to furnish reasonable evidence** of the financial resources within 28 days of Contractor's request, OR
- the Employer **fails to pay** a of an amount due (as certified by the Engineer in an IPC),

### » then the Contractor may

- **Reduce the rate** of work, OR
- **Suspend** work.

In both cases with a **21 days notice** to the Employer.

## 5. Suspension, Termination

- » The Contractor, may terminate the Contract for the following reasons:
  - the Employer **fails to furnish reasonable evidence** of the financial resources within 42 days of Contractor's request,
  - the Engineer **fails to certify** an IPC within 56 days after receiving the Contractor's Statement,
  - the Employer **substantially fails to perform** his obligations under the Contract,
  - the Employer substantially **fails to perform** his obligations related to **entering into Contract** or in case of **assigning** the Contract,
  - the Employer **becomes bankrupt or insolvent, goes into liquidation.**

## 5. Suspension, Termination

- » The Employer, may terminate the Contract for the following reasons:
  - the Contractor **fails to furnish the Performance Security or make good a failure after being notified to do so,**
  - the Contractor **abandons the Works** (with no intention to continue),
  - the Contractor **fails to proceed** with the Works or **disregards a notice to correct** or **fails to remedy** a defect,
  - the Contractor **subcontracts the whole** of the Works or **assigns** the Contract (without preliminary agreement),
  - the Contractor **becomes bankrupt or insolvent, goes into liquidation,**
  - the Contractor gives or offers to give (directly or indirectly) to any person any **bribe, gift, gratuity, commission** or other thing of value, as an inducement or reward.



## 5. Suspension, Termination

### » Employer's termination for convenience:

- The Employer shall be entitled to **terminate** the Contract, **at any time** for the Employer's convenience.
- The termination **shall take effect 28 days** after the **later** of the dates on which the Contractor receives this notice to terminate OR the Employer returns the Performance Security.
- The Employer **shall not** terminate the Contract for convenience in **order to execute the Works himself** or to **be executed by another contractor**.

## 5. Suspension, Termination

### » Notice to correct [S-CI 15.1]

- **Before terminating** the contract, the **Employer MAY notify the Contractor** to make good any failure.
- Such notice shall:
  - = State, that it is given under S-CI 15.1,
  - = **Describe the nature** of the Contractor's failure,
  - = Specify a **reasonable time** to remedy.
- In certain breach situations it is **not necessary** to give such notice – Employer's termination can be initiated without this notice being given.

# 5. Suspension, Termination

## ► Payment on termination

### By the Employer

for Contractor's failure / for convenience

Withhold payments to the Contractor until Costs incurred by the Employer are determined;

Recover from the Contractor any losses and damages incurred;

The balance to be paid to the contractor.

The price of works carried out;  
 Cost of Plant and Materials – paid by and delivered to the Employer;  
 Cost or liability reasonably incurred;  
 Cost of removing Temporary Works and repatriation of staff.

### By the Contractor

The price of works carried out;

Cost of Plant and Materials – paid by and delivered to the Employer;

Cost or liability reasonably incurred;

Cost of removing Temporary Works and repatriation of staff.

**+ Loss of profit!**



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## *END of Session 4*

# *Thank you for your kind attention!*

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