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2018 FIDIC

مؤتمر الكويت الرابع لعقود فيديك

KUWAIT 4th FIDIC CONFERENCE

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Organized by



Evolution of dispute resolution under the FIDIC Red Book

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10 May 2018



Pinsent Masons

بنسنت ماسونز

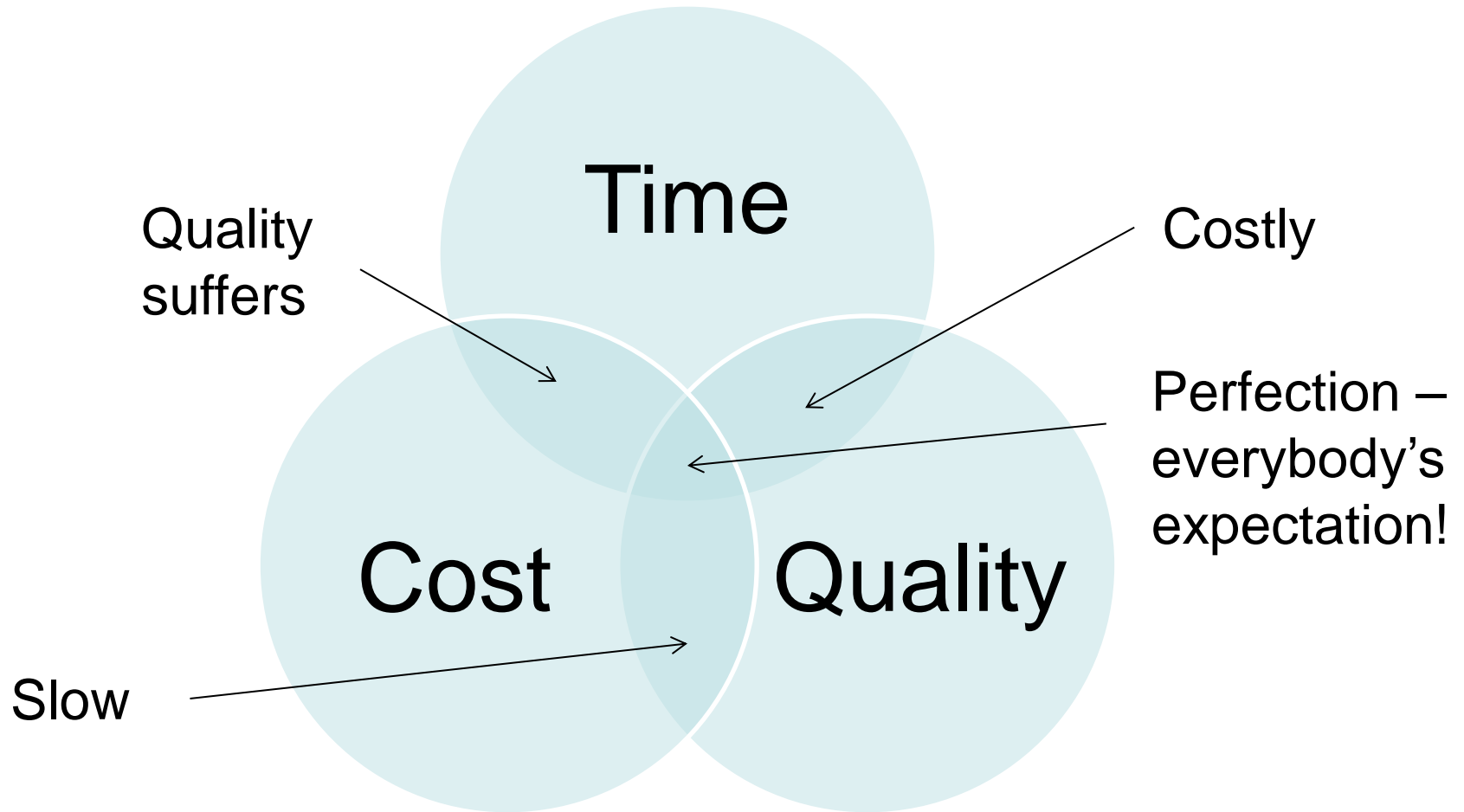
Outline

- Disputes – why a dispute resolution procedure is needed
- How the dispute resolution provisions in the FIDIC Red Book have evolved from 1987 – 2017
 - Role of the Engineer in resolving claims and disputes
 - How has the process changed ?
 - What potential pitfalls have caused these changes ?
- Conclusions

What disputes?

- Construction and engineering projects commonly run into problems – why?
 - Every project is different
 - site conditions
 - supply chain
 - regulatory landscape
 - changes
 - Asset owners demand continuous improvement
 - faster
 - cheaper
 - better

Projects are inherently risky



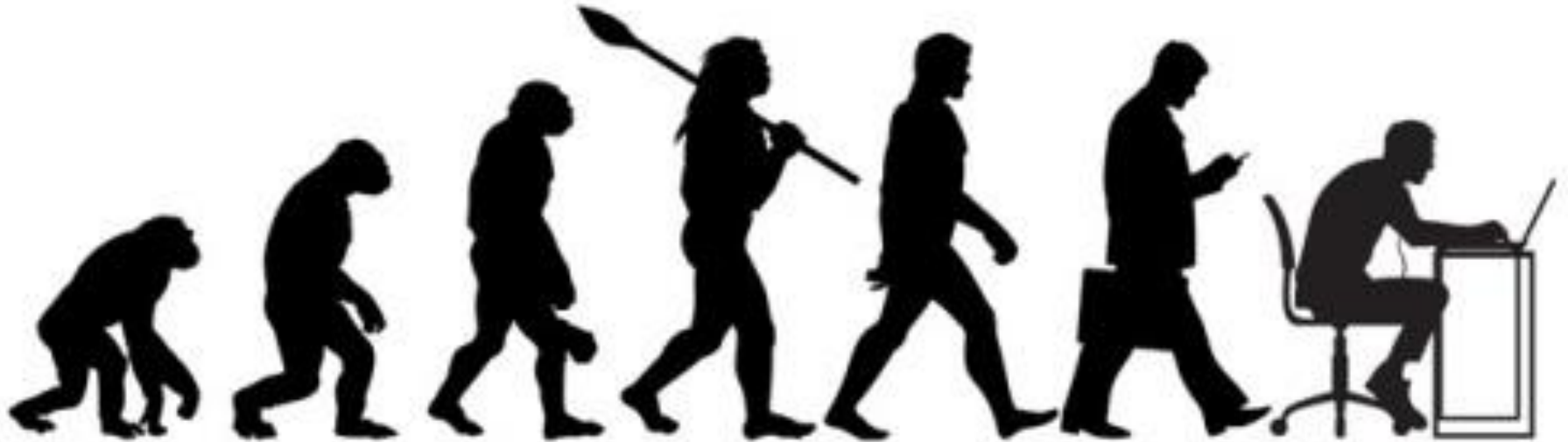
Which issues most commonly lead to construction / engineering disputes?

- Variations to scope
- Interpretation of contract terms
- Delayed completion
- Site conditions
- Late, incomplete or substandard design
- Obtaining approvals
- Site access
- Poor performance and defects
- Pricing errors

Resolving disputes

- Claims and disputes are almost inevitable
- Parties say that they want their disputes resolved: -
 - quickly
 - cheaply
 - correctly (i.e. their position prevails)
 - minimal disruption to the project
 - maintaining commercial relationships
- Query whether this is the case once they are involved in a dispute
- How has FIDIC addressed this over the past 30 years?

Evolution of dispute resolution under FIDIC Red Book 1987 - 2017



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1987



The Engineer

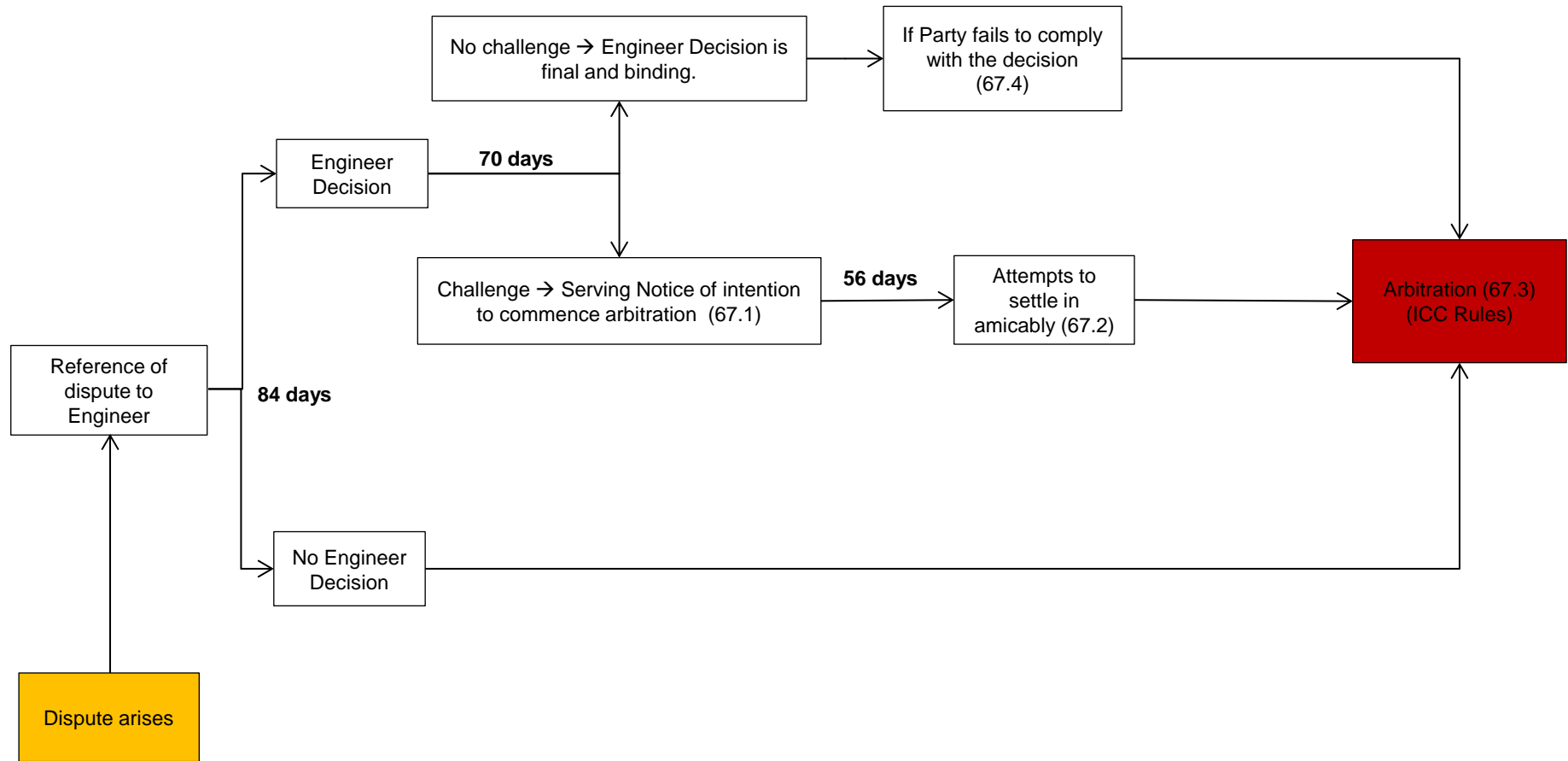
- The Engineer is not a Party - will likely be involved before there is a contract in place with the Contractor
- The Engineer has a central role to play in the avoidance, resolution and crystallisation of disputes :
 - Receiving Contractor's notices and claim
 - Assessment of payment claims
 - Assessment of time claims
 - Assessment of Variation claims
 - Giving instructions, determinations and approvals
 - Power to audit and make inspections
- Historically a 'quasi-arbitral' function
- The Engineer's role in dispute resolution has also evolved

Evolution of the Engineer's role

- Pre-1999:
 - multiple roles: designer, project manager, contract administrator, certifier, and adjudicator
 - all “disputes” must go to the Engineer for a decision prior to arbitration
 - the Engineer's role was twofold:
 - acting as the Employer's agent in executing certain duties, and
 - acting impartially when deciding disputes between the Employer and Contractor.
- Issues:
 - impartiality of the Engineer questioned (paid/employed by the Employer)
 - potential for conflict of interest where Engineer also the designer
- Post-1999:
 - Engineer replaced by the Dispute Adjudication Board (DAB) for resolution of disputes.

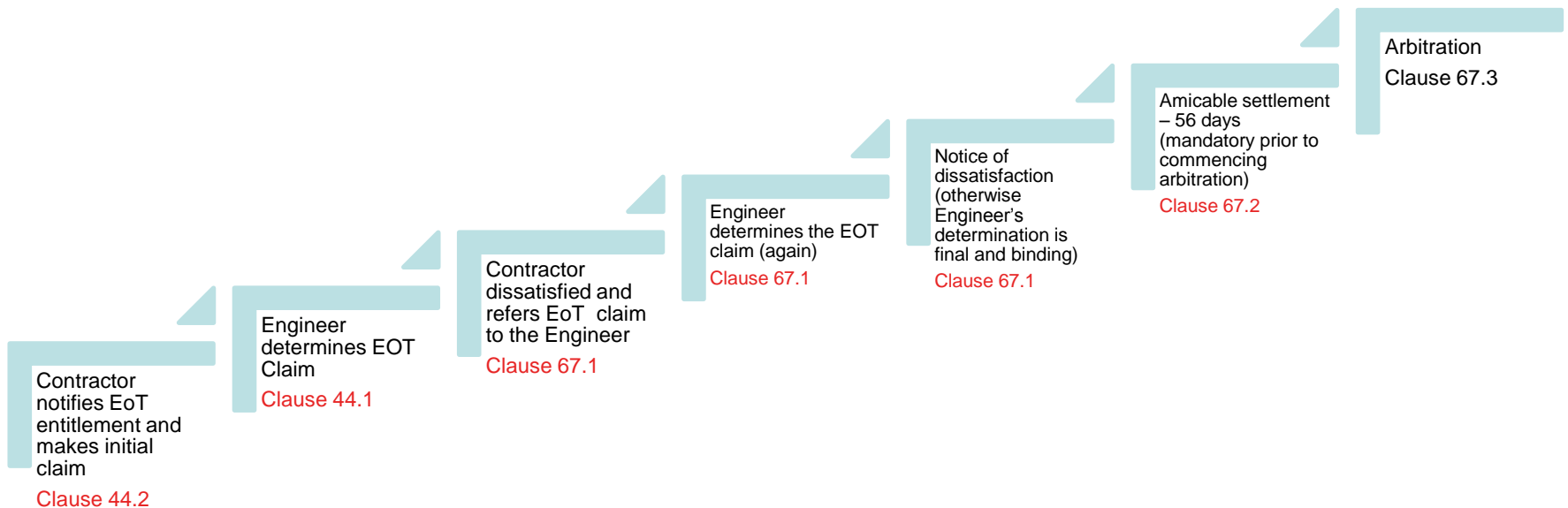
1987 Red Book

Dispute Resolution Process



1987 Red Book

Extension of time claim example



1987 Red Book

Issues:

- Complex drafting – difficult to understand
- Duplication of process – in most cases the reference to the Engineer will be in respect of a claim s/he has assessed – potentially futile ?
- Engineer is ‘quasi-arbitrator’
 - Impartiality ?
 - Duty to consult ?
 - Decision final and binding by default
- Lengthy procedure – 84 + 70 + 56 days
- Jurisdictional issues - Engineer’s reference is a condition precedent to commencing arbitration

1999

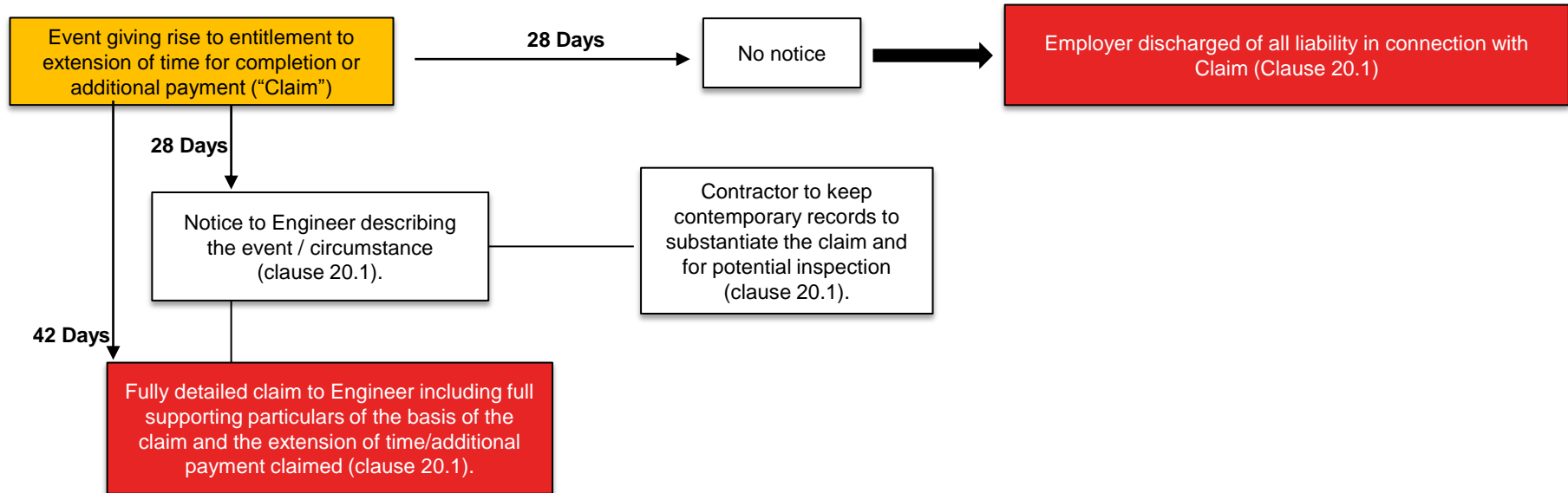


1999 Red Book

- Revisions to the procedure for assessment of claims by the Engineer
- Introduction of the Dispute Adjudication Board where the Engineer's determination is disputed
- Amicable settlement and Arbitration are retained
- Four distinct phases
 - Claim notification
 - Engineer's determination/ Party agreement
 - Dispute Adjudication Board
 - Arbitration

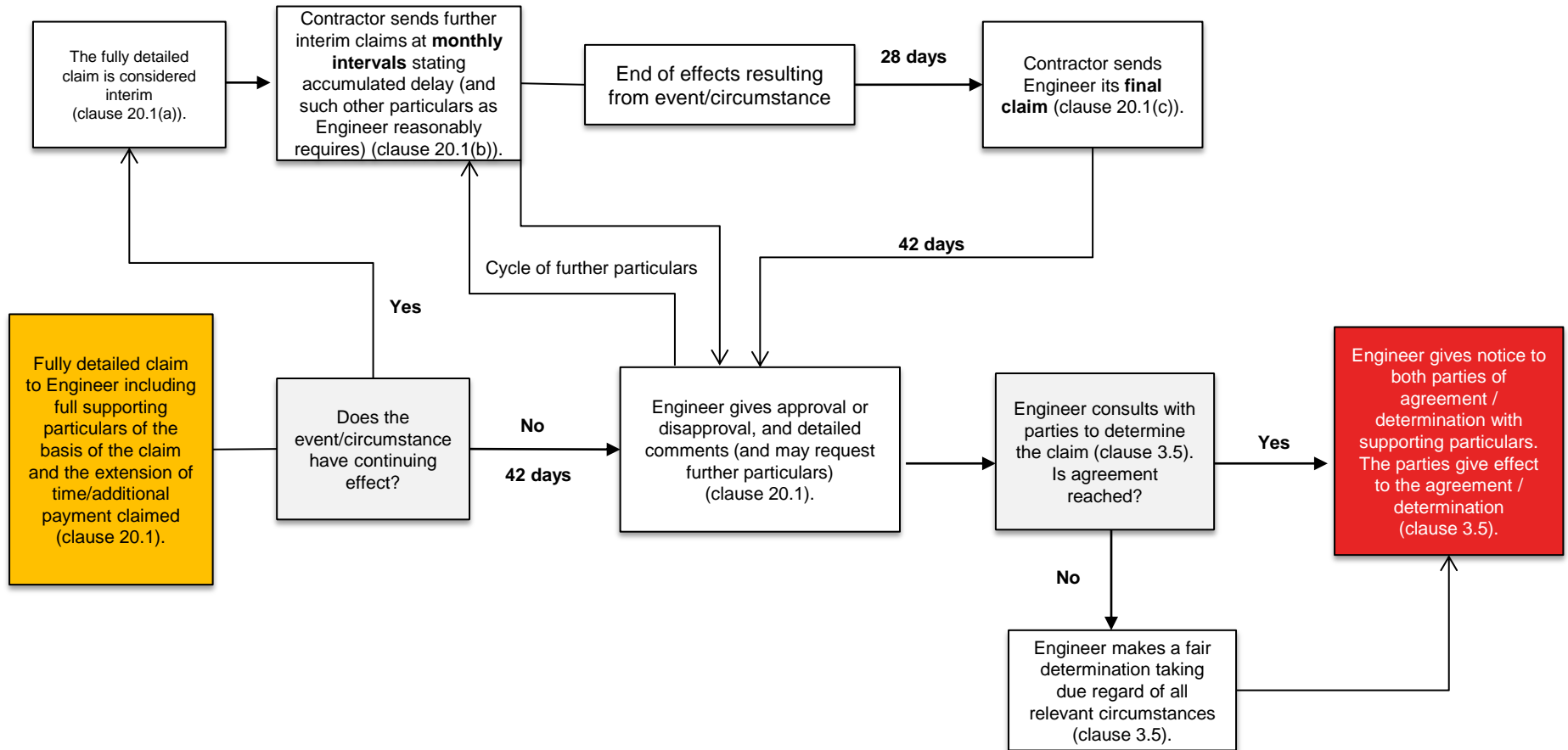
1999 Red Book

Notification of Claims



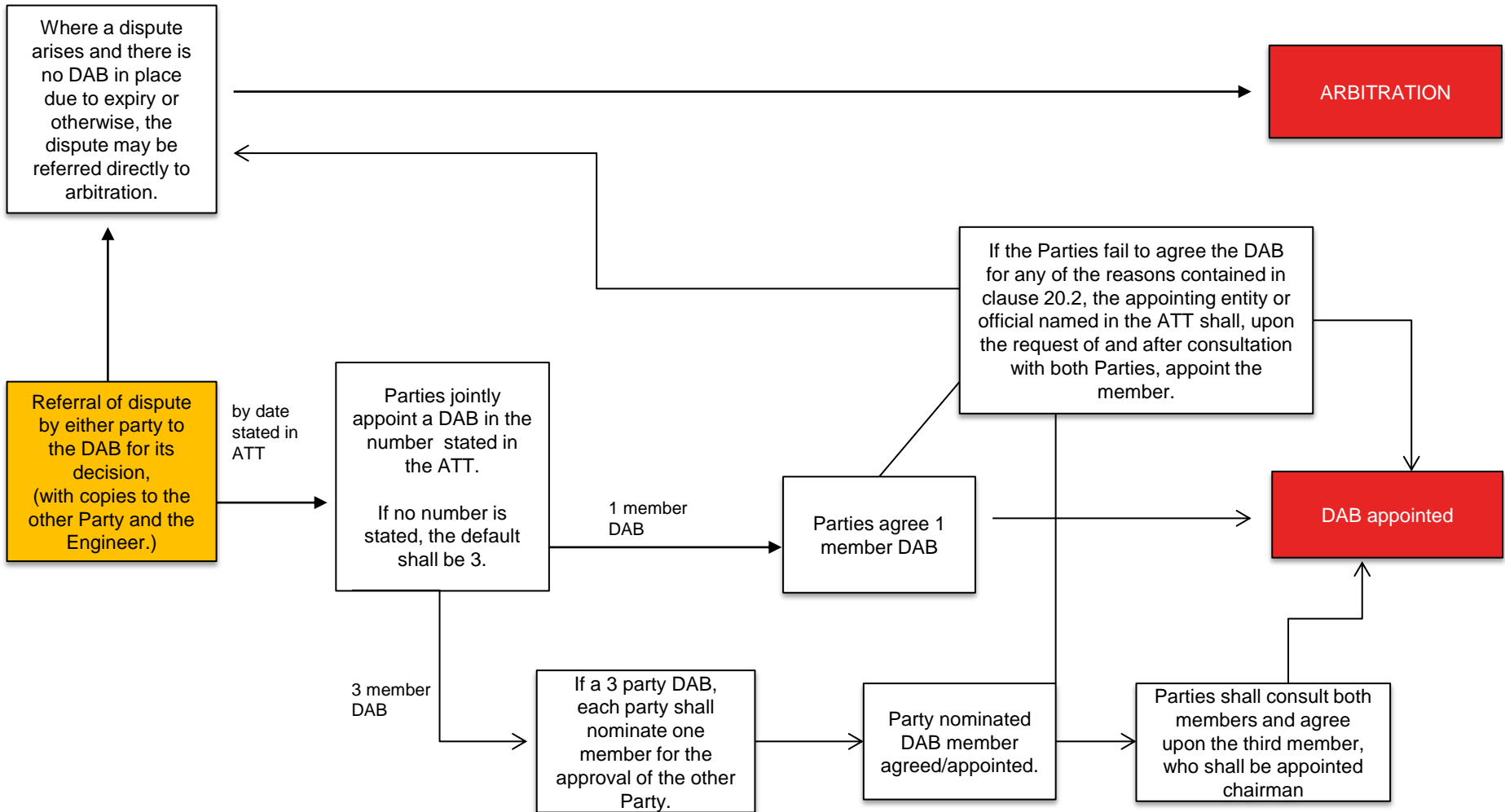
1999 Red Book

Engineer's determination of a claim



1999 Red Book

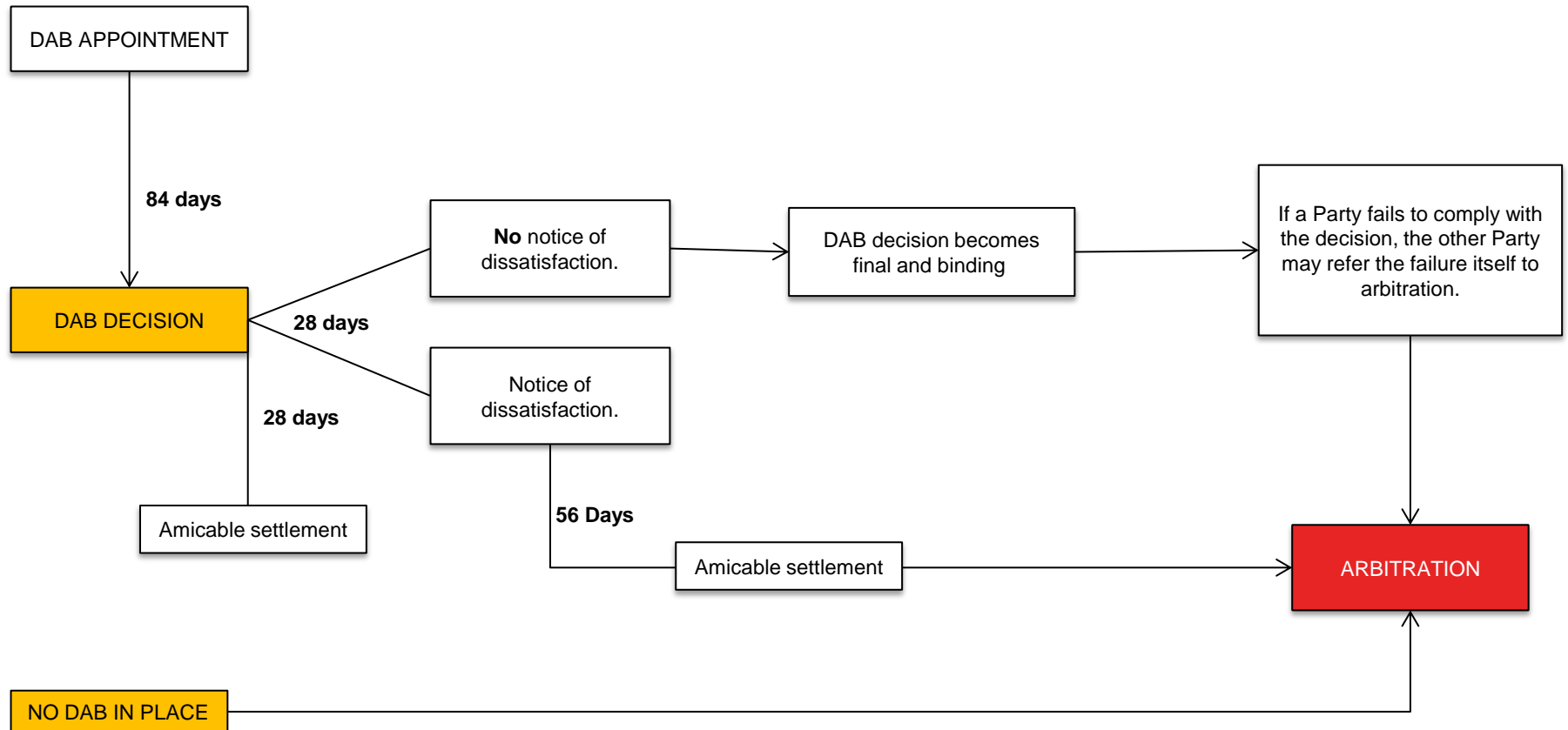
Appointment of the DAB



* ATT = Appendix to Tender

1999 Red Book

DAB to arbitration



1999 Red Book

What has evolved?

- Claim determination procedure is more detailed, but:
 - Scope of clause 20.1 – ‘any EoT ... and/or any additional payment, under ... these Conditions or otherwise in connection with the Contract’. Does it apply to claims where no time or money is claimed (e.g.. Defect/no defect disputes?) Is payment for Variations additional?
 - Unclear drafting – distinction between the Engineer’s ‘determination’ of claim and ‘response with approval / disapproval’ and ‘response on principles of the claim’
 - Unclear relationship with clause 3.5 and clause 14.6 – ‘Payment Certificate shall include such amounts as have been reasonably substantiated as due ...’ – underutilised in practice. How does this relate to the determination/approval process?
 - Requirement for a ‘fully detailed claim’ with ‘full supporting particulars’ – in practice this has been abused
 - Further particulars cycle – in practice this has also been abused. Potentially perpetual (when can the Contractor escalate the dispute if the Engineer doesn’t determine it)
 - Patently asymmetric – favours the Employer (c.f. clause 2.5 for Employer claims)

1999 Red Book

What else has evolved?

- Introduction of the DAB

- Standing / ad hoc DAB – unclear but either is possible; standing appears to be preferred (procedural rules require site visits every 4 months)
- One / three members – Parties to choose
- Adjudicative role only – not advisory. Inquisitorial approach. May require hearings.
- Appointment process – if not appointed at the outset, this may be abused. Party appointed members must be ‘approved’ and contract is silent as to what happens if not approved. No time limit within which appointment authority must appoint the DAB member or chairman, if not agreed.
- Time – while 84 day process appears expedited, this is after the initial claim process has been exhausted, and the DAB is appointed. Realistically not a quick process
- Cost – can be expensive (mini-arbitration). Costs may not be recoverable
- Enforcement – New York Convention / local laws do not apply. Arbitration for breach of contract (clause 20.7)
- Optional or Mandatory – clause 20.8 ‘no DAB in place’

2017



2017 Red Book

- What has evolved?
 - Engineer's determination process for claims is clearer
 - Claims process now clearly separated from dispute resolution process (different clauses)
 - Claims process is revamped – asymmetry largely removed
 - Time bar for notification has been softened (but uncertainty is introduced)
 - DAB has transformed into a DAAB ('A' for Advisory)
 - DAAB is to be a standing board
 - Many of the drafting problems have been fixed to give greater certainty of interpretation

2017 Red Book

Claims

- Claims / Disputes now split between two clauses
 - Clause 20 – Employer's and Contractor's Claims
 - Clause 21 – Disputes and Arbitration
- Clause 20 corrects and improves upon 1999 Red Book:
 - Claim is defined
 - Contractor and Employer claims are addressed in the same way
 - Not limited to EoT and 'additional' payment claims
- Time bar application is modified
 - Applies to Contractor and Employer claims (28 days)
 - Engineer must give initial response on time bar within 14 days
 - Notice deemed 'valid' if Engineer fails to give initial response, but deemed position can be challenged by other party
 - Claiming party can challenge application of the time bar (factual or 'why late submissions is justified')

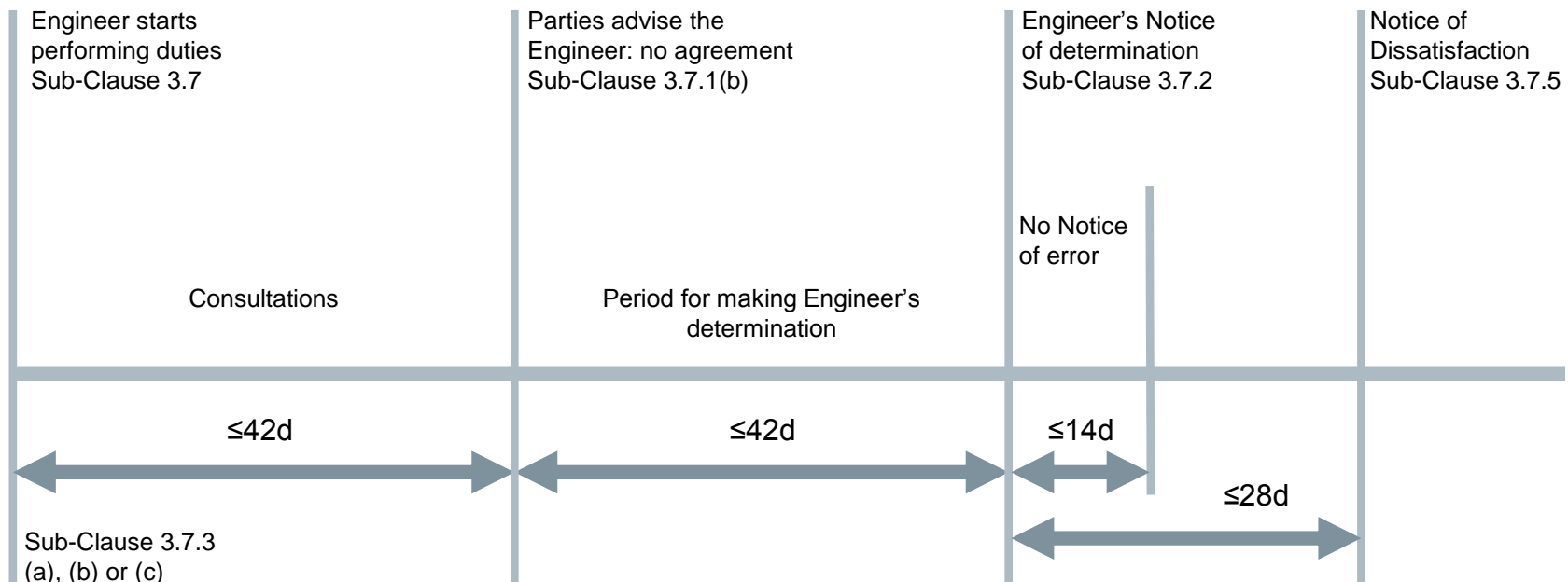
2017 Red Book Claims

- Fully detailed claim
 - now defined (but not exhaustively)
 - Time for submission now 84 days from becoming aware of circumstances of claim
 - Additional time bar (Notice lapses) if legal basis of claim not provided within 84 days:
 - Engineer to give initial response within 14 days
 - If Engineer fails to do this, Notice becomes valid again
 - Additional particulars curtailed (one iteration only)
 - Engineer's response on 'principles' of claim clarified to be 'contractual or legal basis of the Claims' to be provided within the time limit for agreement in clause 3.7
 - Claim agreement / determination procedure in clause 3.7 clarified

2017 Red Book

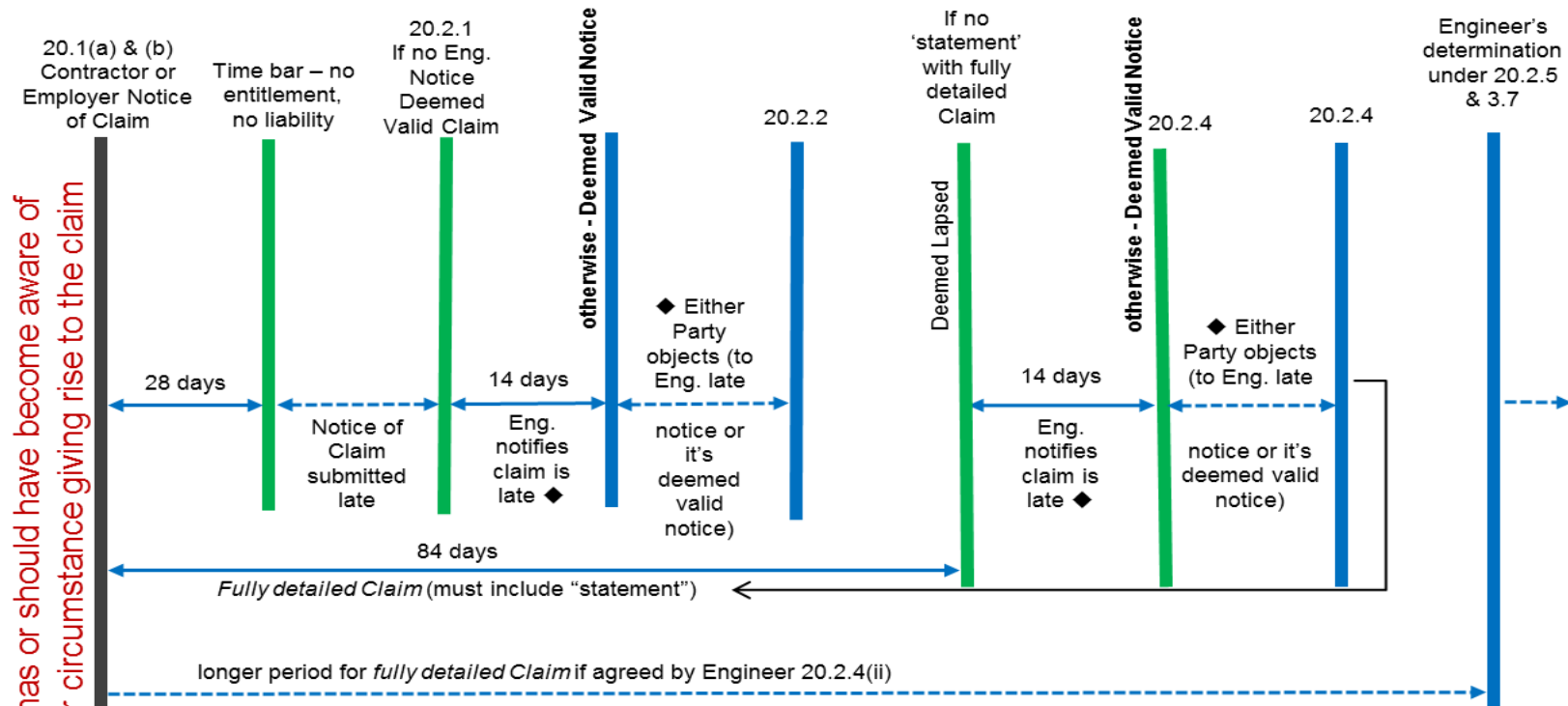
Agreement/Determination under Clause 3.7

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



2017 Red Book

Claims process – under Clause 20.2



♦ If late, then the "*fully detailed Claim*" must justify the lateness and Eng. must consider the justification in making determination under 3.7

2017 Red Book

Disputes

- Disputes is now a defined term (adds clarity)

1.1.29 “**Dispute**” means any situation where:

- (a) one Party makes a claim against the other Party (which may be a Claim, as defined in these Conditions, or a matter to be determined by the Engineer under these Conditions, or otherwise);
- (b) the other Party (or the Engineer under Sub-Clause 3.7.2 [*Engineer's Determination*]) rejects the claim in whole or in part; and
- (c) the first Party does not acquiesce (by giving a NOD under Sub-Clause 3.7.5 [*Dissatisfaction with Engineer's determination*] or otherwise),

provided however that a failure by the other Party (or the Engineer) to oppose or respond to the claim, in whole or in part, may constitute a rejection if, in the circumstances, the DAAB or the arbitrator(s), as the case may be, deem it reasonable for it to do so.

- Disputes must be settled by DAAB (if in place) at least, initially
- Final dispute resolution is by arbitration

2017 Red Book: Disputes

- DAB role enhanced as DAAB
 - Clear intention for DAAB to be standing board
 - Drafting of DAAB appointment improved for clarity
 - Clear mandate to DAAB to advise on the avoidance of disputes is asked jointly, or of its own accord (but by invitation)
- Advisory role
 - Request for advice can be made at any time except when the Engineer is consulting / making a determination on the issue under clause 3.7
 - The process envisages the DAAB undertaking site visits and convening meetings. This will give rise to considerable additional cost
 - The Parties are not bound to act on the DAAB's advice
 - The DAAB shall not be bound in any future dispute resolution process by any advice or views given during the dispute avoidance process

2017 Red Book

Disputes

- Dispute resolution role
 - If a Notice of Dissatisfaction with an Engineer's Determination has been served, the Dispute must be referred within 42 days of the Notice. Otherwise, the Notice will be deemed to lapse (in which case the Engineer's Determination will become final and binding)
 - Referral of a Dispute to the DAAB shall be deemed to interrupt the running of any applicable statute of limitation or prescription period, unless prohibited by law (dealt with later)
 - Procedural rules for DAAB are enhanced

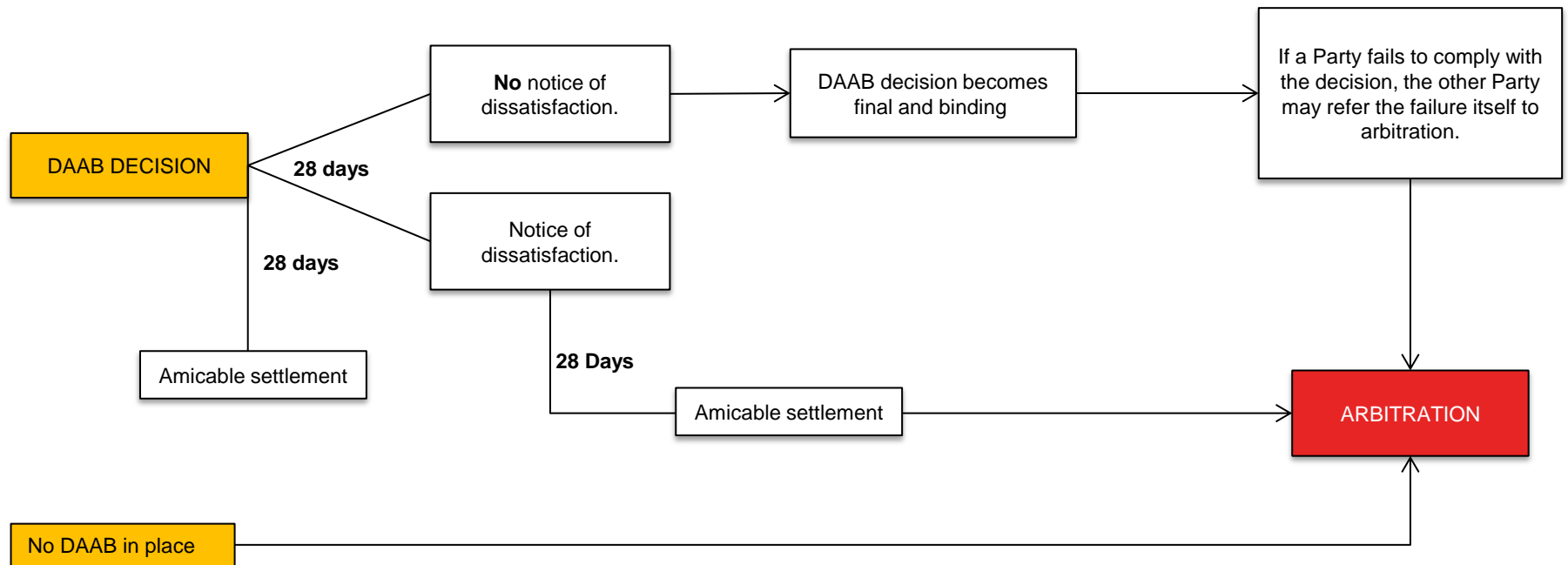
2017 Red Book

Disputes

- DAAB Decisions
 - It is possible to dispute only parts of the DAAB's decision
 - Parties must promptly comply with the DAAB decision, whether or not a Party also serves a Notice of Dissatisfaction
 - If a Party fails to comply with a DAAB decision (whether or not it has become final and binding), the other Party may refer the failure itself directly to arbitration
 - This has clarified that DAAB decisions which have not yet become final and binding can be enforced directly by arbitration
 - The application of clause 21 requires careful consideration in the GCC States as adjudication is not recognised (unlike arbitration), and in some States there is a statutory prohibition on curtailment of prescription periods.

2017 Red Book

DAAB to arbitration



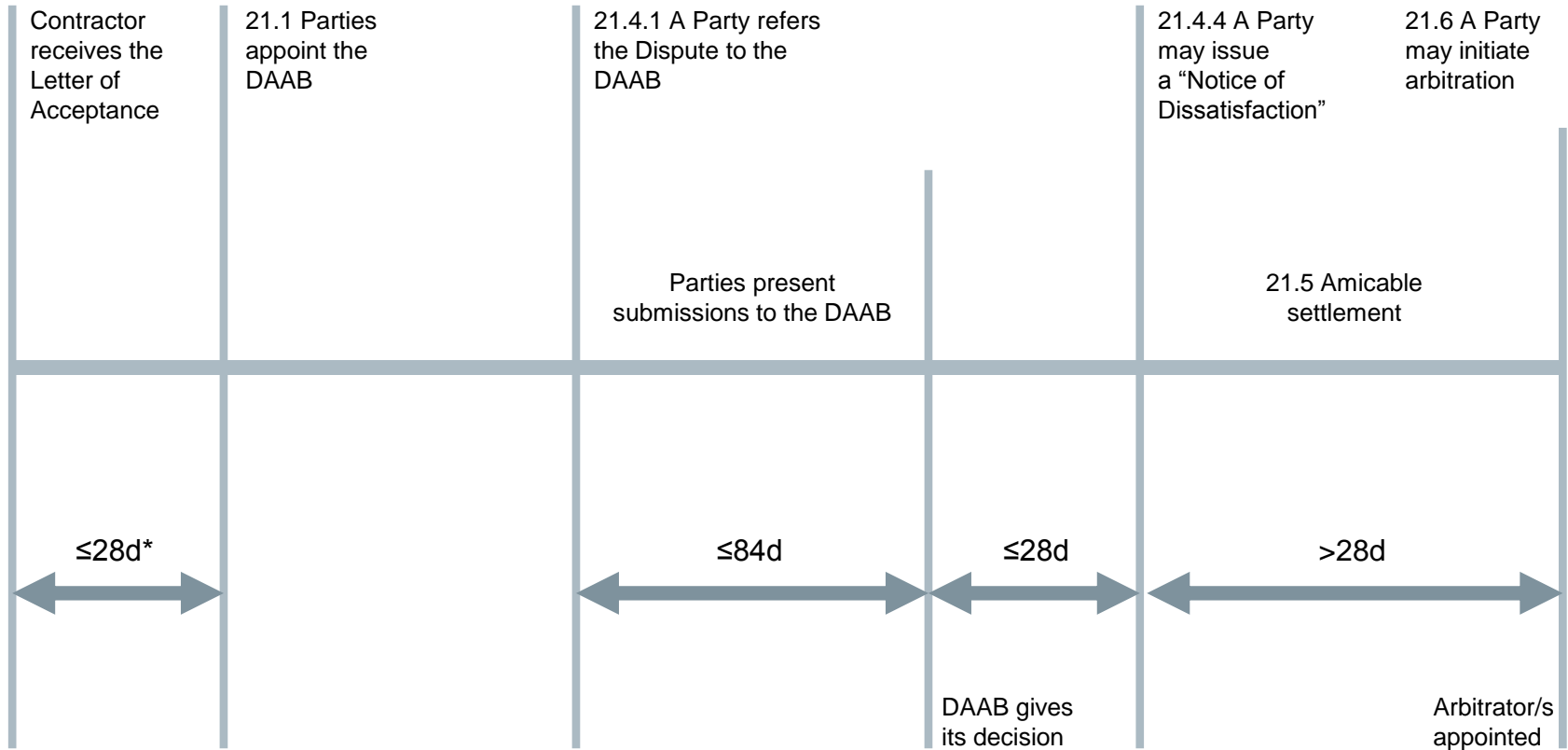
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Arbitration

- Arbitration is a last resort
- There are 5 routes to arbitration:
 - Notice of Dissatisfaction with DAAB's decision followed by an attempt to amicably settle the Dispute
 - Notice of Dissatisfaction with DAAB's decision followed by a 28 day period
 - A failure to comply with an agreement / final and binding Engineer's Determination
 - A failure to comply with a DAAB decision
 - There is no DAAB in place or being constituted.

2017 Red Book

Summary of Clause 21 Dispute resolution



* If not stated otherwise in the Contract Data (Sub-Clause 21.1)

Conclusions

- Has the evolution been progressive?
 - Time
 - Cost
 - Quality
- What are the biggest improvements in 2017?
- What are the potential issues?

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