



CONSTRUCTION
LAW
INSTITUTE

DISPUTE RESOLUTION UNDER FIDIC CONTRACTS

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Profile

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Current Positions:

- Chairman, Chartered Institute of Arbitrators – Uganda Chapter.
- Director, Chartered Institute of Arbitrators – Kenya Branch.
- Executive Director, Construction Law Institute.
- Senior Partner, Kaggwa & Kaggwa Advocates.

Memberships:

- Fellow: Chartered Institute of Arbitrators (FCI Arb)
- Fellow: Institute of Construction Claims Practitioners (FICCP)
- Member: Society of Construction Law (UK)
- Member: London Court of International Arbitration (LCIA)
- Member: International Center for Mediation & Arbitration in Kampala (ICAMEK)
- Member: Center for Arbitration & Dispute Resolution
- Member: International Bar Association.
- Member: Uganda Law Society and East Africa Law Society

Common Construction Contracts

- Government of Uganda form of Contract (PPDA).
- East African Institute of Architects (EAIA Blue Book).
- FIDIC (International Federation of Consulting Engineers)
- FIDIC Red Book (Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer).
- FIDIC Yellow Book (Conditions of Contract for Plant and Design Build for Electrical and Mechanical Plant and Building and Engineering Works, Designed by the Contractor).
- FIDIC Silver Book (Conditions of Contract for EPC/Turnkey Projects)



What is FIDIC?



International Federation of
Consulting Engineers (FIDIC)

- FIDIC is a French language acronym for the International Federation of Consulting Engineers.
- FIDIC is a standard form of Contract used for large-value works.
- FIDIC was started in 1913 by the trio of France, Belgium and Switzerland. The United Kingdom joined the federation in 1949.
- FIDIC headquarters are in Switzerland. FIDIC is used in over 200 countries.



WHO USES FIDIC CONTRACTS?

FIDIC contracts are used in Public Infrastructure projects including:



Roads/Bridges



Dams



Plant & Machinery



Oil and gas Projects

FIDIC may be used for Private Contracts. (White book and Green book)



BENEFITS OF USING FIDIC CONTRACTS?

- FIDIC contracts are standardized & hence preferred by International Contractors who deem it as fair.
- Clarity of contracts, consistent wording
- Covers all kinds of issues that may arise during construction
- Provides a Dispute Resolution Mechanism as works progress
- Has best practices in the industry and addresses the common issues
- Condition for Multilateral Development Banks (MDBs)
- FIDIC is used for Development projects funded by MDBs for use in aid-funded projects. Project Financiers in Uganda include:
 1. AfDB
 2. World Bank
 3. European Union
 4. China Exim Bank
 5. JICA-Japanese International Corp. Agency
 6. BADEA – Arab Bank for Economic Development in Africa



FIDIC RAINBOW SUITE



FIDIC Contracts are operated through the FIDIC General Conditions of Contract found in the FIDIC Books.

Main difference in the books is the risk apportionment between Employer & Contractor. Who does the Design/Who bears risk for change in quantities?



PARTIES TO FIDIC CONTRACTS

Employer

Owner of the project e.g Government Agency (UNRA, Ministry of Energy, KCCA)

Engineer/Project Manager

Appointed by the Employer to act as Employer's representative (Consulting Engineer/Supervisor) – Red, Yellow & Pink book. *Silver book does not specify an Engineer but an Employer's Representative.

Contractor

Party with responsibility to carry out the works



THE BOOKS

- Red Book
- Pink Book
- Yellow Book
- Silver Book
- Golden Book
- White Book
- Green Book
- Blue Book



Colours relate to the type of works



RED BOOK

The Red Book provides conditions of contract for construction works where the Building & Engineering.

Works are designed by the Employer.

Employer designs & hence bears the risk for changes in quantities. Contract is admeasurement based contract.

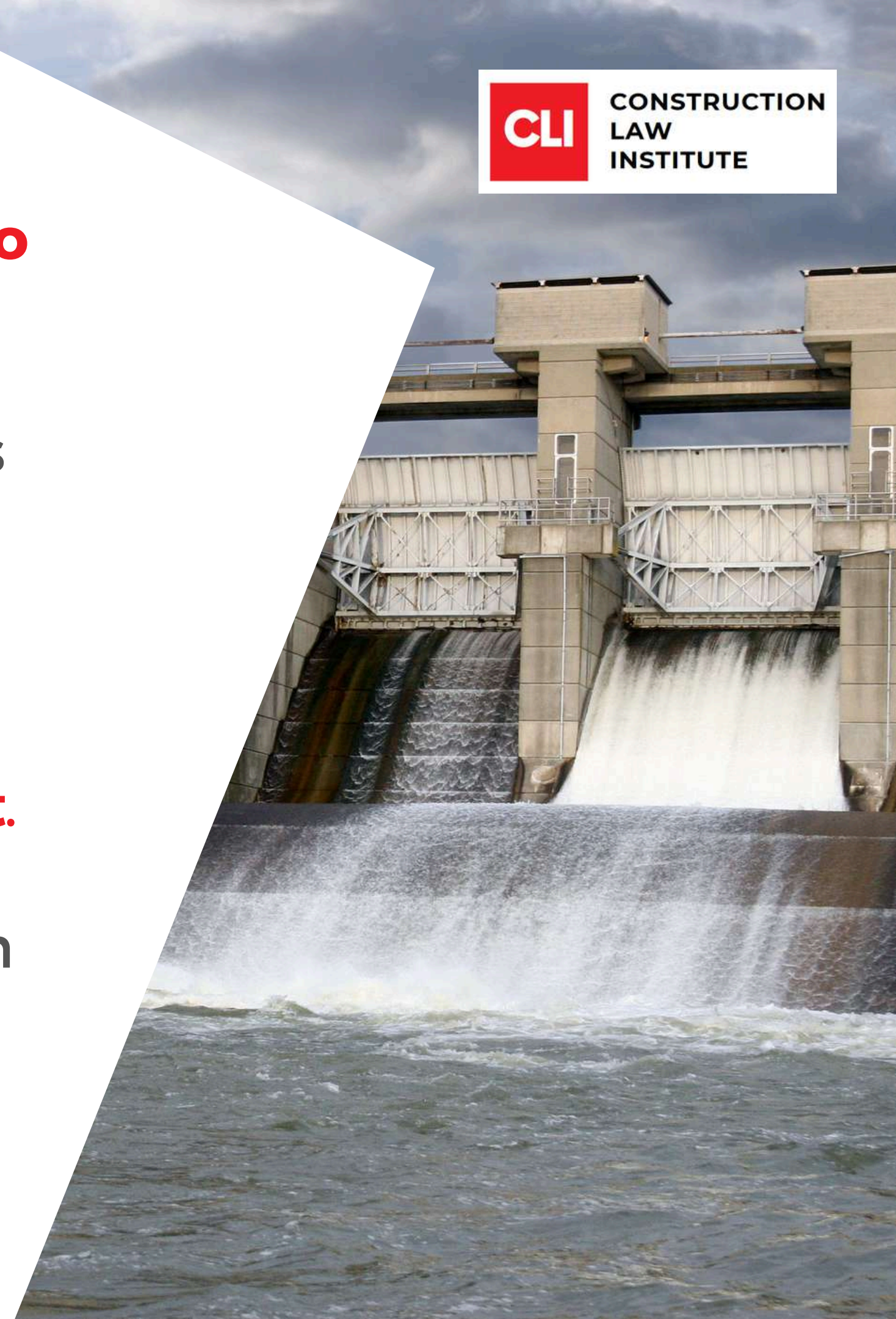


A Construction Claim.

A construction claim is **a request by either party to the contract**, usually the Contractor, for compensation for damages or their relief such as EoT, caused by failure of the other party to fulfil his part of obligations as specified in the contract.

A Dispute

A construction dispute arises **because of disagreements between the parties to a contract**. They are due to a perceived or real violation of a construction contract and the obligations set forth therein such as failure to administer the contract; and unsubstantiated or incomplete claims being made by the parties involved.



Contractors often make the following claims:

- Claims for Variations Instructed
- Claims for Extension of Time (EoT)
- Claims for Prolongation Costs/Loss of Profit
- Claim for idle Equipment & Manpower/Personnel
- Claim for Acceleration & Disruption ETC



**Project Manager
Engineer**

- **Determination.**
- **Payment
Certificates.**

**Adjudicator/
DAB/DAAB**

- **Adjudication
Report.**
- **Binding but
not Final.**

Arbitrator

- **Arbitral Award**
- **Final and
Binding.**
- **Enforceable by
the High Court**



- FIDIC Contracts provide for Claims and how they are to be presented.
- Notice must be issued within 28 days from the Contractor's awareness of the events/circumstances giving rise to the claim.
- Note that FIDIC 2017 provides that if a Party cannot meet the 28-day Notice period, it should notify the Engineer and give reasons for the delay.
- FIDIC 1999 provides under SC 20.1 that failure to give a Notice extinguishes the claim.



ELEMENTS OF A CLAIM FOR DELAY DAMAGES

- The FIDIC Sub-Clause 2.5 FIDIC 1999, the Employer's right to claim Delay Damages from the Contractor is well stipulated.
- The Delay Damages are expressed in the Appendix to Tender/Contract Data as a percentage of the final Contract Price. These damages can also be capped at a maximum percentage of the final Contract Price.
- The Employer is required to issue a Notice as a prerequisite for its claim for Delay Damages. (No time limit in FIDIC 1999).



ROLE OF DAB/DAAB

- Encourages discussion in relation to key issues that Affect:
- Time (completion);
- Money (financial claims and financial changes); and Quality (which may have an impact on the above).
- Encourages resolution of issues and disputes at “job site level”.
- Advisory opinions (if requested).
- Holds informal meetings as necessary to:
- Give advisory opinions on potential issues or disputes
- Make decisions on formal disputes.



ROLE OF DAB/DAAB

- Either party can refer a dispute to the DAB.
- Parties are given equal opportunity to present their cases.
- Written decisions of the DAB are reasoned and implemented promptly by the parties.
- Project owners, contractors, and designers support and engage with the DAB.
- DB members are absolved from any personal professional liability arising from the DAB activities.

REFERRAL OF DISPUTES TO THE DAB

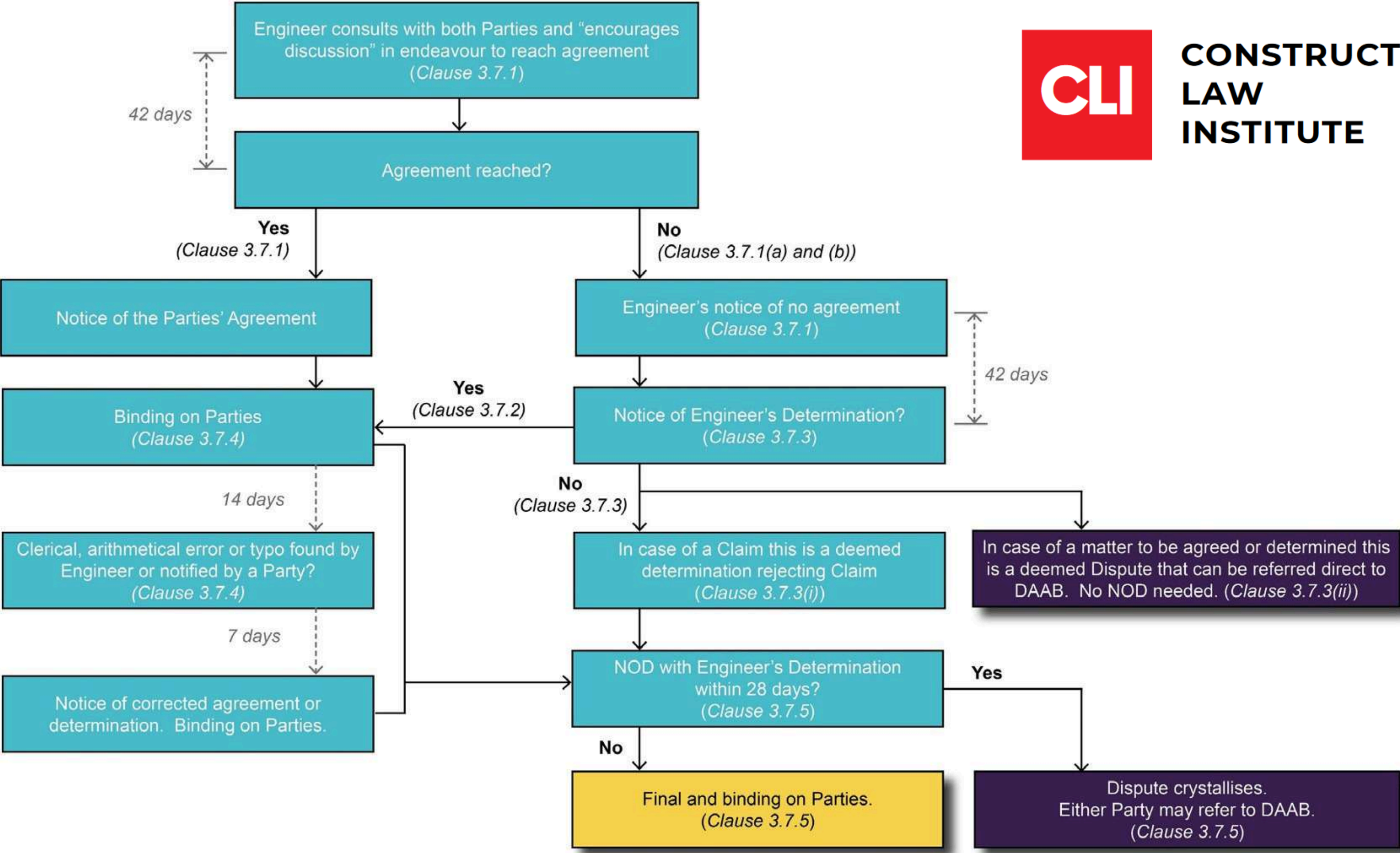
- There is no prescribed format for referring a dispute to the DAB.
- The referral must be in writing, copied to the other Party and the Engineer/Employer's Representative and state that it is given under Sub-Clause 20.4.
- The referral should also comply with the general requirements for communications in Sub-Clause 1.3 and be sent to the correct address by an approved means of communication.



THE DAB'S DECISION

- The DAB must give its decision within 84 days after receiving the written reference unless a different period is agreed with the Parties.
- In the Yellow and Silver Books, the 84-day period begins on the later of the date when the DAB receives the reference or its advance payment from the Contractor.
- The decision must be reasoned (although the reasons do not need to be extensive).
- The decision must state that it is given under Sub-Clause 20.4.





EFFECT OF THE DAB'S DECISION

- The DAB's decision is binding on the Parties and must be complied with promptly unless and until it is revised by amicable settlement or an arbitral award.
- If a Party is dissatisfied with the decision and wishes to proceed to the next stage in the dispute resolution procedure, it must give a notice of dissatisfaction within 28 days after receiving the decision.
- The notice of dissatisfaction must state that it is given under Sub-Clause 20.4 and give the reason(s) for the dissatisfaction.



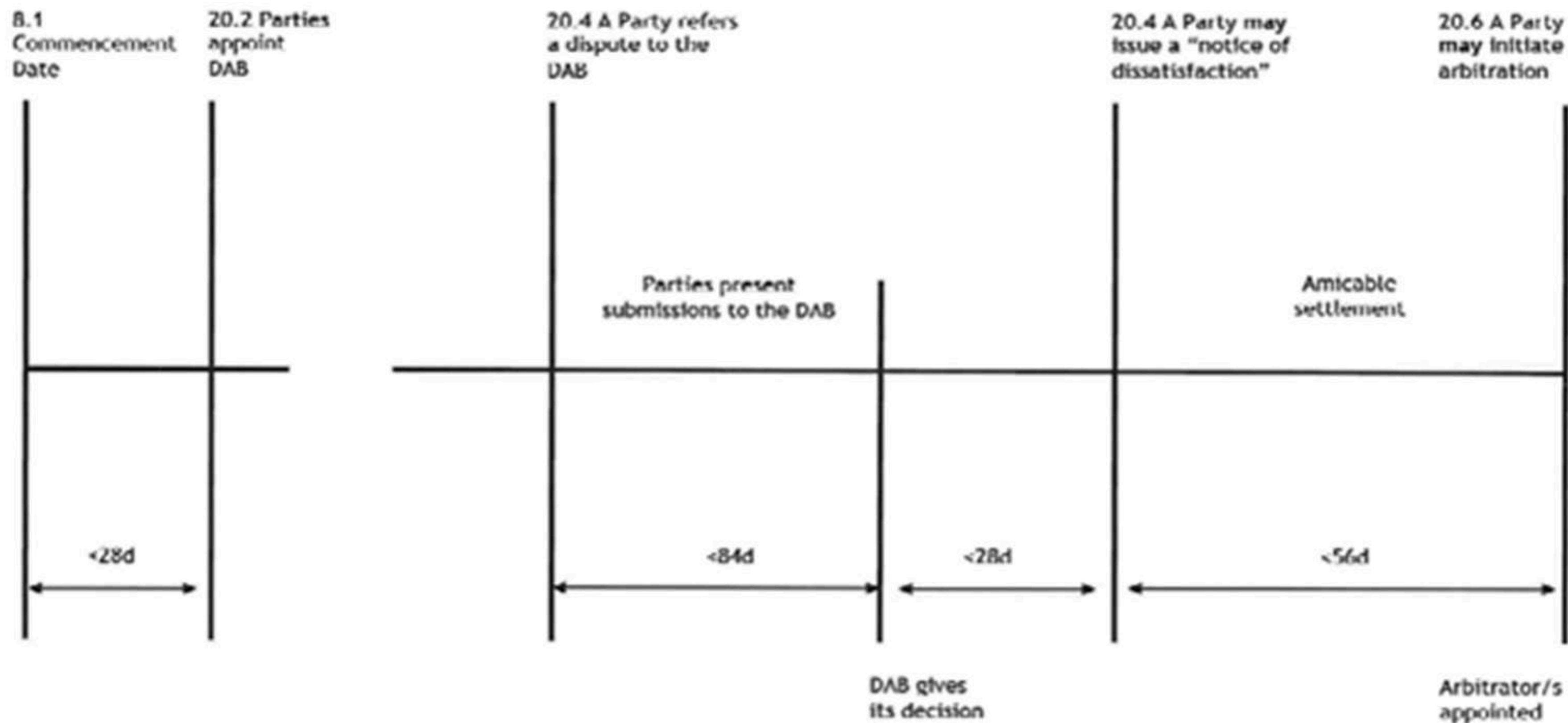
AMICABLE SETTLEMENT

- Sub-Clause 20.5 (Sub-Clause 20.7 in the Gold Book) provides that: “both Parties shall attempt to settle the dispute amicably before the commencement of arbitration”
- If the Parties fail to settle their dispute, either Party may refer the dispute to arbitration on or after the 56th day following the date that the notice of dissatisfaction was given even if no attempt at amicable settlement has been made.
- Amicable Settlement is a pre-condition to Arbitration.

ARBITRATION

- Rules of Arbitration of the International Chamber of Commerce (ICC Rules) – unless agreed otherwise.
- ICC arbitration is administered and scrutinised. It is paid for by the Parties based on the amount in dispute).
- A consequence of arbitrating under ICC Rules is that the Parties agree to waive their rights to appeal insofar as permitted by the law governing the arbitration.
- The Parties should agree the 'seat' or 'place' of the arbitration and include this in the contract in the Particular Conditions.





Typical sequence of Dispute Events envisaged in Clause 20



Thank You!

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