FIDIC White BOOK (Fifth Edition, 2017)

Client/Consultant
MODEL SERVICES AGREEMENT

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INTRODUCTION

- FIDIC has lately published the 5th Edition of its Client/Consultant Model Services Agreement (the White Book).
- FIDIC has also published the second edition of the Sub-Consultancy Agreement to be inline with the new White Book.
- This white book represents the basic form of a Contract of Appointment between a Client and its Consultant. And a fair balance of risk is provided between the Client and the Consultant. It is intended to cover the minimum requirements of a typical appointment contract.
- The Agreement is suitable for general use for the purposes of pre-investment and feasibility studies, detail design, and project management & administration of construction, both for Employer-led design teams and for Contractor-led design teams on design and build commissions.

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CONTENT

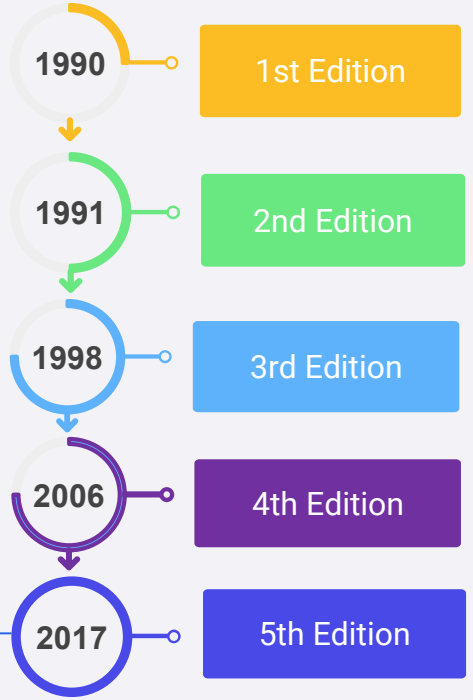
i. Form of Agreement

ii. Particular Conditions

Part A - References from Clauses in the General Conditions
Part B - Additional or Amended Clauses
Appendices

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

iii. General Conditions



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SUMMARY OF DIFFERENCES

SL. No	4th EDITION	5th EDITION
1	Clause 1 – General Provisions	Clause 1: There are many new sub-clauses like Intellectual property, Relationship, Amendment of agreement, good faith etc. added in 5th edition.
2	Clause 2 – The Client	Clause 2: Structure is same as 4th Edition. However all the sub-clauses are elaborated in more detail in 5th edition. And Sub-clause 2.9 (Payment for services) is removed from new version.
3	Clause 3 – The Consultant	Clause 3 is enhanced by adding new sub-clauses like safety & security of consultant personnel & contract administration.
4	Clause 4 - Commencement, Completion, Variation & Termination	Clause 4 - Commencement & Completion: Variation & termination is now separated from commencement and completion hence, 5th edition is having 10 clauses in total where as 4th edition has only 8 clauses.
5	-	Clause 5 - Variation to Services: Variation in 5th edition is an independent clause and described in detail by adding impact of variation and procedure for reaching the agreement of variation value.
6	-	Clause 6 - Suspension of Services & Termination of Agreement: Effect of suspension & effect of termination sub-clauses are added newly which makes easier for the parties to understand the consequences of such events.
7	Clause 5 - Payment	Clause 7: Structure and content is same as 4th edition. Whereas, more time constraints are specified precisely in 5th edition.
8	Clause 6 – Liabilities	Clause 8: Although structure is same, the indemnity sub-clause is eliminated in 5th edition and added in clause 9 as a indemnity insurance.
9	Clause 7 - Insurance	Clause 9: Insurance of Client's property was detailed as a sub-clause in 4th edition but not in 5th edition.
10	Clause 8 – Disputes & Arbitration	Clause 10: Disputes and arbitration is reorganized by adding adjudication.
11	Appendix	Rules for adjudication is added as a new 5th appendix in 5th edition

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CONTENTS DIFFERENCE IN DETAIL

4th Edition		5th Edition	
Clause No.	Description	Clause No.	Description
1	GENERAL PROVISIONS	1	GENERAL PROVISIONS
1.1	Definition	1.1	Definition
1.2	Interpretation	1.2	Interpretation
1.3	Communications	1.3	**Notices & other** Communications
1.4	Law & Language	1.4	Law & Language
1.5	Change in Legislation	1.5	Changes in Legislation
1.6	Assignments & Sub-contracts	1.6	Assignments & Sub-contracts
1.7	**Copyright**	**1.7**	**Intellectual Property**
1.8	Notices	1.8	**Confidentiality**
1.9	Publication	1.9	Publication
1.10	Corruption & Fraud	1.10	**Anti-**Corruption
		1.11	**Relationship of Parties**
		1.12	**Agreement Amendment**
		1.13	**Severability**
		1.14	**Non Waiver**
		1.15	**Priority of Documents**
		1.16	**Good Faith**

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4th Edition		5th Edition	
Clause No.	Description	Clause No.	Description
2	**THE CLIENT**	2	**THE CLIENT**
2.1	Information	2.1	Information
2.2	Decisions	2.2	Decisions
2.3	Assistance	2.3	Assistance
2.4	Clients Financial Arrangements	2.4	Clients Financial Arrangements
2.5	Equipment and Facilities	2.5	**Supply of Client's** Equipment and Facilities
2.6	Supply of Client's Personnel	2.6	Supply of Client's Personnel
2.7	Client's Representative	2.7	Client's Representative
2.8	Services of others	2.8	Services of others
2.9	Payment for Services	2.9	----------
3	**THE CONSULTANT**	3	**THE CONSULTANT**
3.1	Scope of Services	3.1	Scope of Services
3.2	Normal, Additional & Exceptional Services	3.2	**Function & purpose** of Services
3.3	Duty of care & Exercise of Authority	3.3	**Standard of** care
3.4	Client's Property	3.4	Client's Property
3.5	Supply of Personal	3.5	**Consultant's** Personal
3.6	Representatives	3.6	**Consultant's** Representatives
3.7	Changes in Personnel	3.7	Changes in **Consultant's** Personnel
		3.8	**Safety & security of Consultant's Personnel**
		3.9	**Construction Administration**

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4th Edition		5th Edition	
Clause No.	Description	Clause No.	Description
4	**COMMENCEMENT, COMPLETION, VARIATION & TERMINATION**	4	**COMMENCEMENT & COMPLETION**
4.1	Agreement Effective	4.1	Agreement Effective
4.2	Commencement & Completion	4.2	Commencement & Completion **of Services**
4.3	Variations	4.3	**Programme**
4.4	Delays	4.4	Delays
4.5	Changed Circumstances	4.5	**Rate of progress of services**
4.6	Abandonment, Suspension or Termination	4.6	Exceptional **Event**
4.7	**Corruption & Fraud**	5	**VARITION TO SERVICES**
4.8	Exceptional Services	5.1	Variations
4.9	Rights & Liabilities of Parties	5.2	Agreement of Variation value & impact
		6	**SUSPENSION OF SERVICES AND TERMINATION OF AGREEMENT**
		6.1	Suspension of Services
		6.2	Resumption of Suspended Services
		6.3	Effect of Suspension of Services
		6.4	Termination of Agreement
		6.5	Effects of Termination
		6.6	Rights and Liabilities of the Parties

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4th Edition		5th Edition	
Clause No.	Description	Clause No.	Description
5	**PAYMENT**	7	**PAYMENT**
5.1	Payment to the Consultant	7.1	Payment to the Consultant
5.2	Time for payment	7.2	Time for payment
5.3	Currencies of Payment	7.3	Currencies of Payment
5.4	Third party changes on the Consultant	7.4	Third party changes on the Consultant
5.5	Disputed Invoices	7.5	Disputed Invoices
5.6	Independent Audit	7.6	Independent Audit
6	**LIABILITIES**	8	**LIABILITIES**
6.1	Liability & Compensation between the parties	8.1	Liability **for Breach**
6.2	Duration of Liability	8.2	Duration of Liability
6.3	Limit of Compensation	8.3	Limit of **Liability**
6.4	Indemnity		----------
6.5	Exceptions	8.4	Exceptions
7	**INSURANCE**	9	**INSURANCE**
7.1	Insurances for liability & indemnity	9.1	**Insurances to be taken out by Consultant**
7.2	Insurance of Client's property	10	**DISPUTES AND ARBITRATION**
8	**DISPUTES AND ARBITRATION**	10.1	Amicable Dispute Resolution
8.1	Amicable Dispute Resolution	10.2	**Adjudication**
8.2	Mediation	10.3	**Amicable Settlement**
8.3	Arbitration	10.4	Arbitration
		10.5	**Failure to Comply with Adjudicator's Decision**

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Main Changes in 5th Edition

1. General Changes

- Structure is same as 4th edition, rather FIDIC has made significant revisions and is having more elaborated clauses making them more convenient for implementation in its new edition compared with the 4th Edition.
- Variation & termination is separated from commencement and completion.
- 4th Edition has only 4 rules in Appendices whereas “Rules for adjudication” is added as a new rule in 5th edition.
- Good Faith (New sub clause): A new obligation on the parties to act in good faith and in the spirit of mutual reliance has been included.

2. Form of Agreement & Priority of documents

- Order of precedence for documents forming part of the Agreement is specified. In particular, while it stated ‘this Client/Consultant Model Services Agreement’ was to form part of the Agreement, 4th edition failed to recognize whether the general or particular conditions should take precedence, which is clarified now.

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3. Scope of Services

- Guidance for filling out Appendix 1 - Scope of Services detailed in new edition of the White Book. It should be described in detail specifying

1. The exclusions, function & purpose of the Services,
2. Any information's such as sub-surface or hydrological conditions- relied upon by the Consultant in the discharge of the Services that cannot be reviewed by the Consultant for accuracy and sufficiency,
3. The construction administration requirement to be fulfilled by the consultant & identify the interface management between the Services and services provided by others etc.,

4. Termination

- As per new edition, If the Agreement is terminated by Client for convenience (Not in order to carry out the services itself or from others) then **the Consultant shall be entitled to be paid the loss of profit that would otherwise have been earned on the Services not performed due to the termination**. Even though 4th Edition does contain a termination for convenience clause but does not differentiate the effect of it from other forms of termination.
- Besides, the 4th Edition does not permit the immediate termination for specific cases of the consultant's default or vice versa (for example bankruptcy and corruption), which is now stated clearly in two categories as **Termination by Client and Termination by Consultant.**
- The Consultant's right to Terminate for suspension of work is now reduced to a shorter time frame i.e. From 182 days to 168 days.
- The consultant's right to suspend has also been improved by allowing the consultant to suspend services after 7 days notice has been given since the date of non payment, whereas the 4th Edition only permitted suspension following 28 days of non payment.

5. Variations

- The 5th Edition deals with variation in a more extensive manner by considering it as a main clause. According to 4th edition, there are no clear time-limits for the submission of variation requests and no proper methodology of valuation. And also it is not stated precisely regarding client's right to omit services.
- According to 5th edition, a variation may be issued in respect of any:

1. Amendment to scope of services and personnel, equipment & services provided by the client.
2. Omission of part of the Services
3. Changes in the specified sequence or timing of the performance of service
4. Changes in the method of implementation of services.

6. Exceptional Event

- A detailed exceptional event procedure, which shares the risk of an event between the client and consultant has been included in the 5th edition. A new provision for Variation is also added i.e. Where an Exceptional Event gives rise to an unavoidable change in the scope of Services then a variation shall be issued by the Client.

7. Standard of Care

- The standard of reasonable skill, care and diligence only applies to the performance of the Services according to 5th Edition. All other obligations are treated as absolute. Whereas in 4th edition it was generalized, as it applies not only to the standard of reasonable skill and care in the services performed, but to all obligations within the agreement.

- 5th edition also raises the standard of care to the works to be expected from a consultant experienced in the provision of services for projects of a similar size, nature and complexity.

8. Disputes and Arbitration

- The dispute resolution provisions have been amended to include a comprehensive adjudication procedure (Appointment of Adjudicator, his payment etc.,) set forth in an appendix of the new 5th edition. Under these revised provisions, prior to any referral to arbitration, any disputes not resolved amicably will first need to be referred to adjudication.

9. Construction Administration

- It is a new provision added in the 5th edition, if the Consultant is providing construction administration in relation to the services to be carried out under a Works Contract.
- Under these provisions, the Client shall indemnify the Consultant against any and all claims made by the contractor against the Consultant arising out of the Works Contract.
- If an ambiguity or discrepancy is found between the Consultant's obligations under the Agreement and the Consultant's duties, the Consultant shall give Notice to the Client indicating the same and if necessary Client shall issue a Variation to the Services in accordance with Clause 5.1 [Variations].

10. Time Schedule for services (Programme)

- Though there is a provision for schedule in Appendix 4 of 4th edition, there is no accurate detail for what is to be enclosed in the schedule, nor any commitment that the consultant submit or even comply with a Programme.
- Whereas in new edition, Within 14 days of the Commencement Date the Consultant shall submit its Programme which shall include as a minimum; order & sequence of services, key dates for performance or delivery of parts of the services and key dates when decisions, consents, approvals or information from the Client or third parties, required to be given to the Consultant.
- However new book does not impose liability to reimburse in the form of delay damages if the services are not completed within the Time for Completion.

11. Withdrawal of License for Non-payment

- In the event that the Client is in default of payment of any amounts due under the Agreement then the Consultant may upon 7 days Notice, revoke any intellectual property license granted therein. This is a fairly evident incentive to ensure that the Client does not unreasonably withhold payment.

12. Rely on accuracy of information

- A new responsibility for the client has been included that the Client accepts responsibility for and acknowledges that the Consultant will rely on the accuracy, sufficiency and consistency of all the information provided by the Client or by others on behalf of the Client.
- There is, however, an obligation on the Consultant to review such information to the extent achievable using the Standard of Care in Sub-clause 3.3.1, to ensure that there is no manifest error, omission or ambiguity in the information and to promptly give notice to the Client of any adverse findings.

The 5th Edition White Book seems to have addressed many of the former problematic areas recognized in the 4th Edition. As a result of the changes the parties will be in a good position to realize and manage their risk allocation.

CRITICAL POINTS IN ALL CLAUSES

[Important to be aware of while using FIDIC white book 2017 edition]

Sub Clause 1.3 – Notices and other Communications

- Notices shall be in writing and delivered by hand, sent by mail or courier, or transmitted by any form of agreed system of electronic transmission stated in the Particular Conditions.
- Notices and other form of communications shall not be **unreasonably withheld** or delayed.

Sub Clause 1.6 – Assignments and Sub-Contracts

- Sub-contracting performance of all or part of the services by consultant requires **written consent** from the Client.
- When the appointment of a sub-consultant is included in the Consultant's offer/proposal then the above-stated consent is not required.

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Sub Clause 1.7 – Intellectual Property

- The Consultant shall grant to the Client a **Royalty free worldwide license** to use and copy the Foreground Intellectual Property for any purpose in connection with the Project.

Sub Clause 1.9 – Publication

- Publication of materials requires approval from client if it is within two years of completion of the Services or termination (whichever is the earlier).
- Information's of project can be used for commercial tendering purposes.

Sub Clause 1.10 – Anti-corruption

- Conditions are same as all other FIDIC books. As a minimum the Consultant shall comply with the **FIDIC Code of Ethics & the FIDIC Integrity Management System** available at www.fidic.org.
- Additionally, Consultant is required to give immediate Notice in case of any public official requesting illicit payments.

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Sub Clause 2.4 – Client's Financial Arrangements

- The Client shall submit reasonable evidence of financial arrangements for timely payment within **28 days** of request from the Consultant.

Sub Clause 2.6 – Supply of Client's Personnel

- Consultant shall arrange for an alternative supply of personnel at the Client's cost and the Client shall issue a Variation to the Services in case of failure by client to supply his personnel or if the consultant is not satisfied with the performance of the personnel supplied by the Client.

Sub Clause 3.7 – Changes in Consultant's Personnel

- The cost of replacement shall be borne by the Consultant except where the replacement is requested by the Client. In case, if client requests then the Client shall bear the cost of replacement unless misconduct or inability is the reason for the replacement.

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Sub Clause 4.3 – Programme

- A notice shall be given by any party in the event of any specific, actual or probable future events or circumstances which may adversely affect or delay the Services or lead to an increase in the cost of the Services.

Sub Clause 4.4 – Delays

- Consultant may claim an **EOT for completion** if the delay happens for the below reasons,

  - A Variation to the Services.
  - Delay caused by Client, or the Client's other consultants, contractors, or other third parties;
  - An Exceptional Event
  - Any other event giving an entitlement to EOT for Completion under the Agreement

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Sub Clause 4.5 – Rate of Progress of Services

- If the consultant is not entitled for EOT and in client's opinion the rate of progress is insufficient to ensure completion, the Client may give Notice to the Consultant. And the Consultant shall revise the Programme by adding new measures to complete the services with the Time for Completion.

Sub Clause 4.6 – Exceptional Event

- If a party is not permitted to perform it's obligations due to an exceptional event, a Notice shall be given **within 14 days** from when the Party becomes aware of the such event.
- Where an Exceptional Event gives rise to a mandatory change in the scope, it leads to variation and consultant is entitled to claim EOT as well if, delay happens due to such event.
- The commitment of payment under agreement shall not be excused by an exceptional event.

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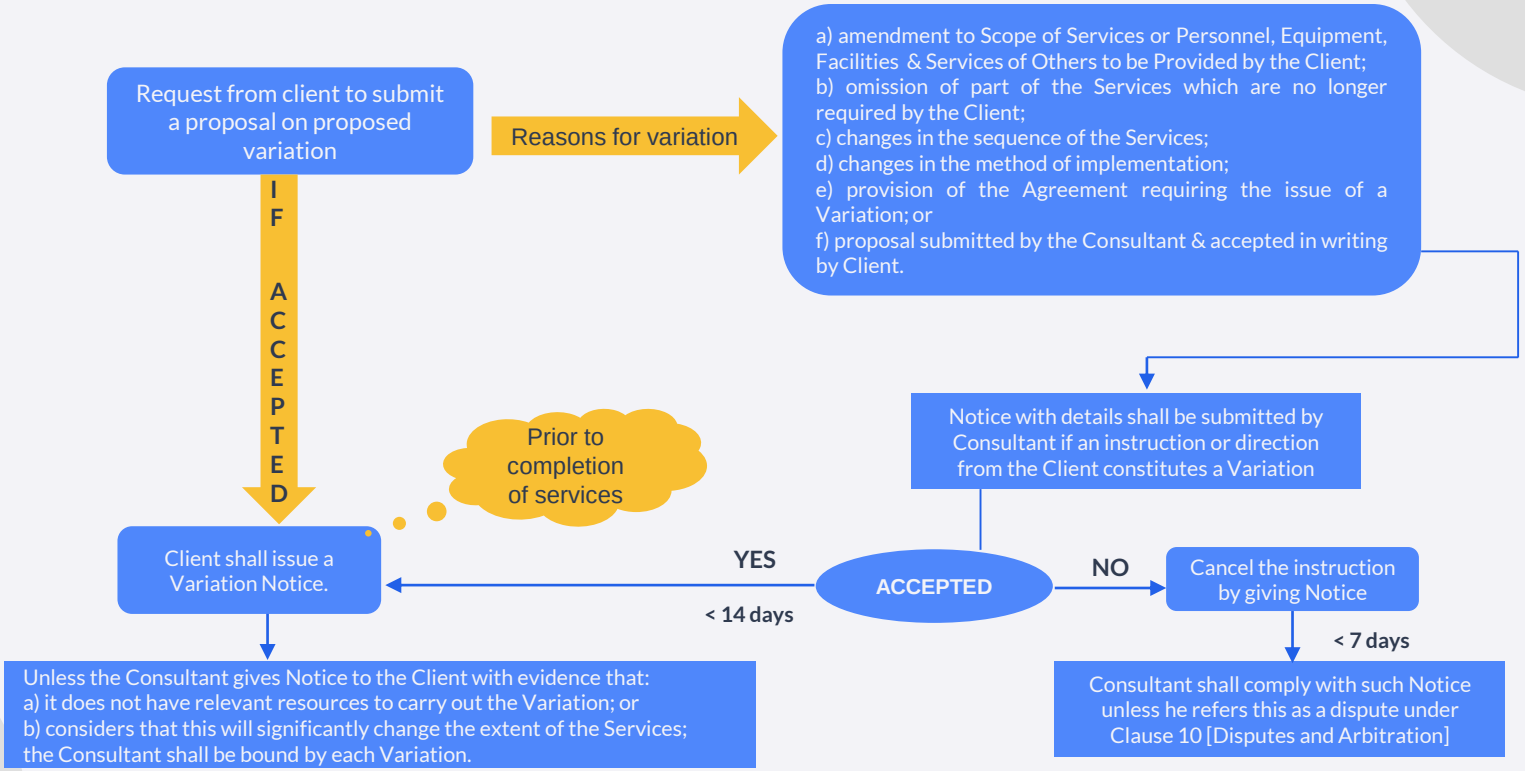
Clause 5 – Variations to Services



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Clause 6 – Suspension of Services and Termination of Agreement

6.1 - Suspension of Services

- Client may suspend the Services for any reason by giving 28 days Notice to the Consultant.
- Consultant may suspend

1. For non-payment by giving 7 days notice to Client
2. Because of exceptional events
3. Failure by client satisfy the requirements of Clause 2.4 [Client's Financial Arrangements].

6.2 - Resumption of Suspended Services

- Consultant shall resume the Services within 28 days of receipt of Notice from the Client instructing to resume the Services.
- In case of suspension from Consultant, the Consultant shall resume the Services, as soon as reasonably practicable after the matters giving rise to the suspension have ceased.

6.3 - Effects of Suspension of the Services

- Consultant shall not perform the Services during suspension, but shall ensure the security, maintenance & custody of the Services.
- If during suspension & resumption Consultant incurs Exceptional Costs,

1. agreed remuneration shall be adjusted as per Sub-clause 7.1.2 [Payment to the Consultant];
2. the Time for Completion shall be amended as per Clause 4.4 [Delays]
3. Consultant shall issue a Notice for these Exceptional Costs.

6.5 - Effects of Termination

If the Agreement is terminated for reasons specified in Sub-Clause 6.4.1 (a) or (b) or (c), Client shall

- Take over all records & documents
- Claim for reasonable costs
- Withhold payment due for consultant until accomplishment of above mentioned entitlement.

If the Agreement is terminated for reasons specified in Sub-Clause 6.4.1 (d) or (e) or 6.4.2, agreed remuneration shall be adjusted for consultant.

6.4 - Termination of Agreement

6.4.1 – Termination by Client

- If the Consultant is in breach of the Agreement
- If Consultant becomes bankrupt,
- Consultant is in breach of Clause 1.10 [Anti – Corruption]
- At its sole discretion by giving the 56 days Notice.
- If Exceptional Event has led to a suspension more than 168 days.

6.4.2 – Termination Consultant

- If the Services has suspended (from client) for more than 168 days
- If the suspension for non-payment is more than 42 days
- If the Client becomes bankrupt
- If the Client is in breach of Clause 1.10 [Anti – Corruption]
- If the Services have been suspended by an Exceptional Event, leads to compromise safety of consultant personnel for more than 168 days

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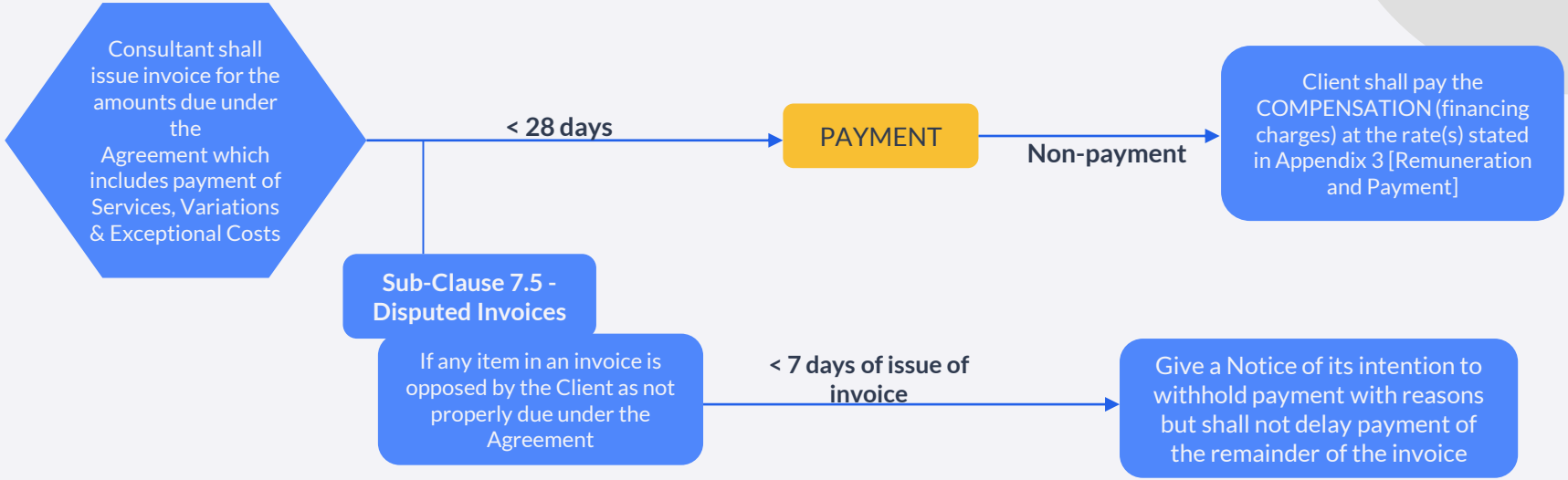
Clause 7 - Payment



NOTES:

1. **Except where the Country is the principal place of business of the Consultant, the Client shall whenever possible arrange that exemption is granted to the Consultants who are not resident in the Country from any payments required by the government/third parties in the Country in respect of their remuneration, goods & documents imported for the Services;**

2. **Except where the Agreement provides for lump sum payments, within one year after the completion or termination of the Services, client by giving notice may perform AUDIT for records claimed by the Consultants.**

Drawback: There is no specific information regarding "Final payment" in the white book

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Sub Clause 8.1 – Liability for Breach

- The Consultant and Client shall be liable for each other for any breach of any provision of the Agreement.

Sub Clause 8.3 – Limit of Liability

- The maximum amount of damages payable in respect of any liability, shall not exceed the amount stated in the Particular Conditions.

Sub Clause 8.4 – Exceptions

- Liability clause shall not apply if claims arising out of fraudulent misrepresentation or reckless misconduct by the defaulting Party.

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Clause 9 – Insurance

Sub-Clause 9.1 - Insurances to be taken out by Consultant

- Professional indemnity insurance [PII]
- Public liability insurance [PLI]
- Workers Compensation insurance
- Employer's Liability insurance
- Any other insurances required by the applicable law

- Professional indemnity insurance shall be maintained for the period of liability stated in the Particular Conditions.
- Consultant shall notify the Client immediately should any of the insurance required by this Clause be cancelled by the insurers or underwriters.

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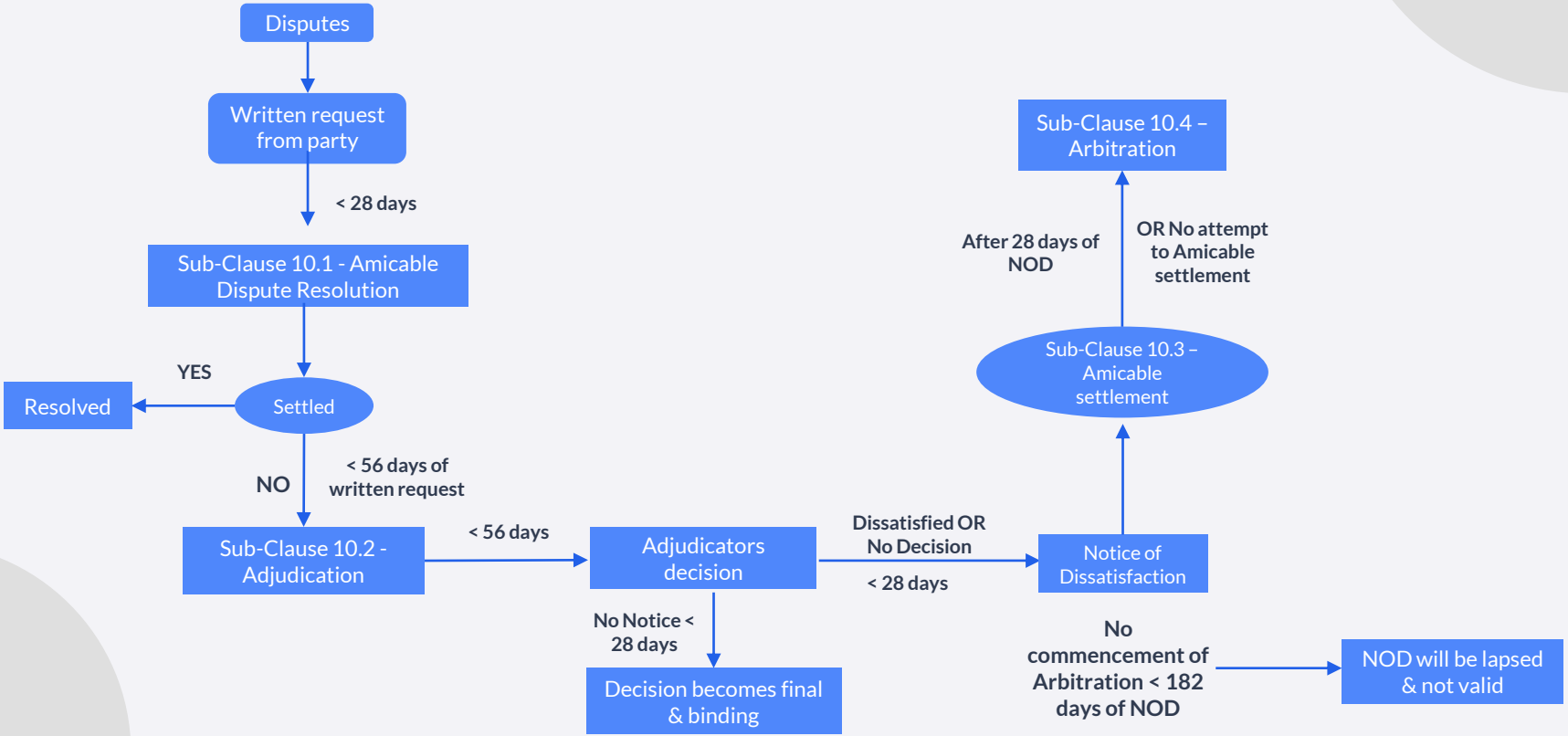
Clause 10: Disputes and Arbitration



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THANK YOU

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