

Implications of payment regime changes in JCT/SBCC 2016

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2016 – what's changed?

"It is not believed that any of the 2016 edition amendments or changes in format will in practice materially affect risk allocation" (JCT Guide to Design and Build Contract 2016)

Nonetheless there have been significant drafting changes to the payment regime:

- ▶ Interim Valuation Dates
- ▶ Payment frequency changes
- ▶ Debt recovery mechanism
- ▶ Changes to loss and expense provisions
- ▶ **Potential traps for the unwary!**

Interim Valuation Date (IVD)

How does it work?

- ▶ IVD is:
 - ▶ chosen by employer and main contractor; or
 - ▶ is the date one month after date of possession
 - ▶ thereafter is same day **or** nearest Business Day (might be earlier!)
- ▶ common date to apply right down through contractual chain

Payment applications

▶ Interim applications:

- ▶ Optional under SBC/Q 2016 – if made must be no later than IVD (cl 4.10.1)
- ▶ Mandatory under DB 2016 – no express date but if later than IVD may push final date back (cl 4.7.3)
- ▶ Application must state (as before) the sum considered due at the due date and the basis upon which calculated
- ▶ Monthly applications now also provided for post PC to final payment

Due and final dates

- ▶ Due date is 7 days after the IVD (cl 4.7.2 – DB; cl 4.8 SBC/Q)
- ▶ If under DB form the payment application is after IVD, the due date moves back
- ▶ Final date is 14 days after the due date (cl 4.9.1 DB; cl 4.11.4 SBC/Q)
- ▶ Payment Notice/Interim Certificate to be given by Employer not later than 5 days after the due date (cl 4.7.5 – DB; cl 4.9.1 SBC/Q)

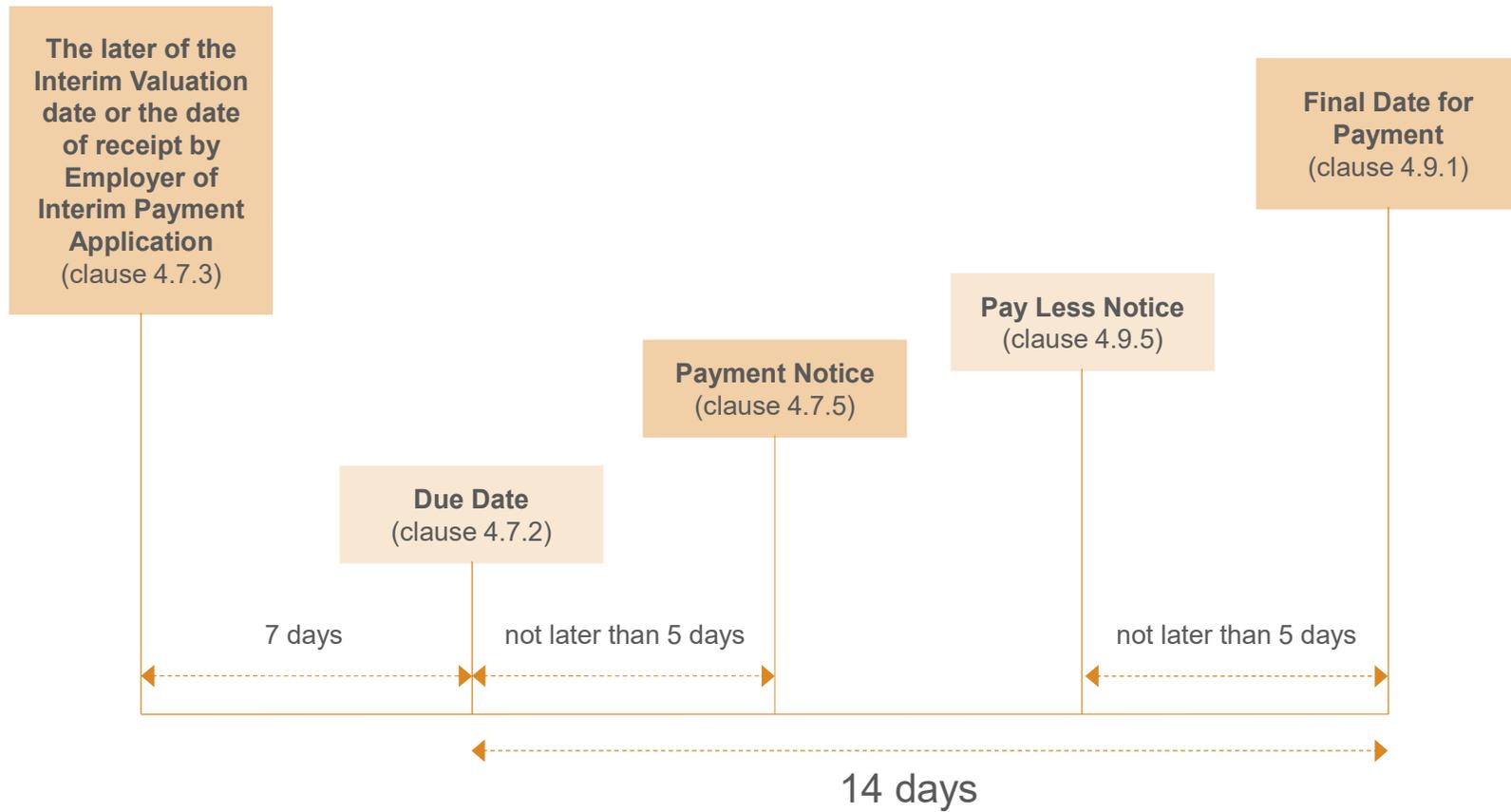
How does it work down the supply chain?

	Payment Application Date	Interim Valuation Date "IVD"	Due Date "DD"	Payment Notice	Final Date for Payment
Main Contract	Any time before the Interim Valuation Date	1 July	(IVD + 7 days) 8 July	(DD + 5 days) 13 July	(DD + 14 days) 22 July
Subcontract	Any time before Interim Valuation Date with option to require a Payment Application to be made at least 4 days prior to the Interim Valuation Date	1 July	(IVD + 12 days) 13 July	(DD + 5 days) 18 July	(DD + 14 days) 27 July
Sub-subcontract	N/A unless the sub-contractor fails to issue a Payment Notice	1 July	(IVD + 17 days) 18 July	(DD + 5 days) 23 July	(DD + 13 days) 31 July

Payless Notices and Final Date

- ▶ Payless notice – no later than 5 days before the final date (c 4.11.5 SBC/Q and cl 4.9.5 DB)
- ▶ Note: the Employer may put forward its own valuation of works in the pay less notice (Henia Investments v Beck Interiors Limited [2015] EWHC 2433)
- ▶ Final date = 14 days after the due date
- ▶ Employer is required to pay either the sum stated as due in the payless notice or the amount set out in the Interim Certificate or Payment Notice (cl 4.11 SBC/Q and cl 4.9 DB)
- ▶ Suspension option in event of non payment after 7 days of notice (cl 4.13 SBC/Q and cl 4.11 DB)

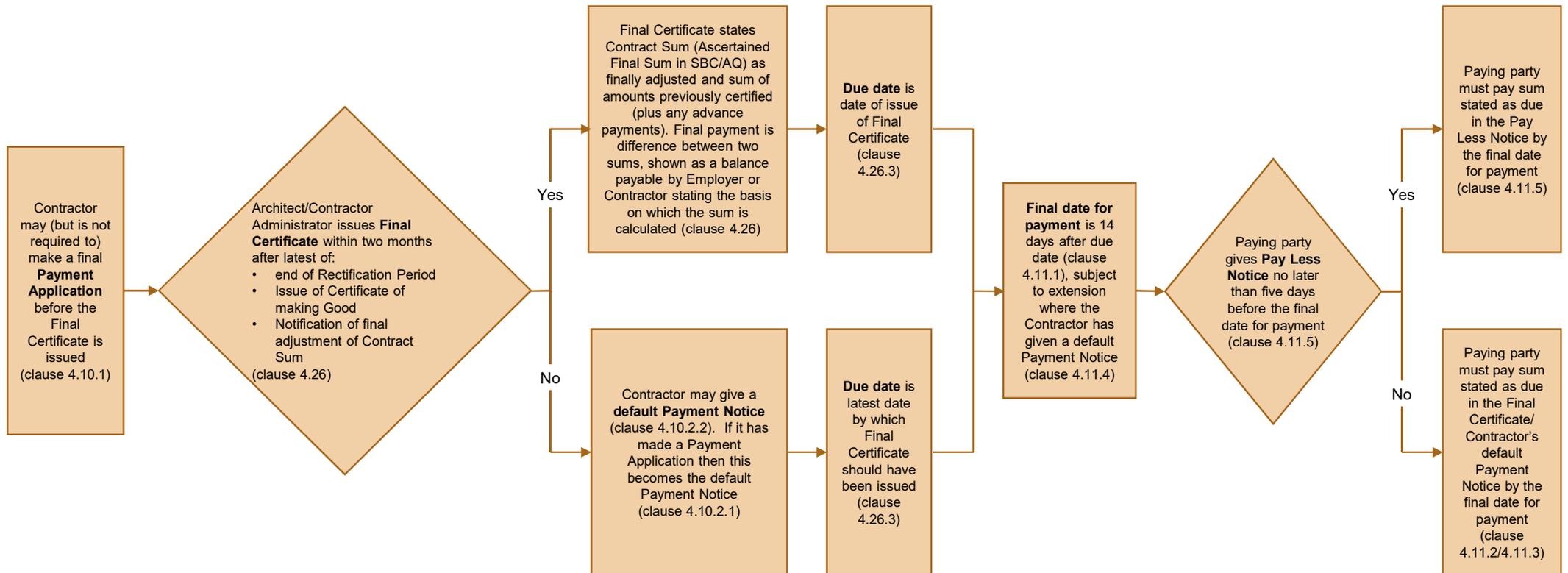
Payment process (DB 2016)



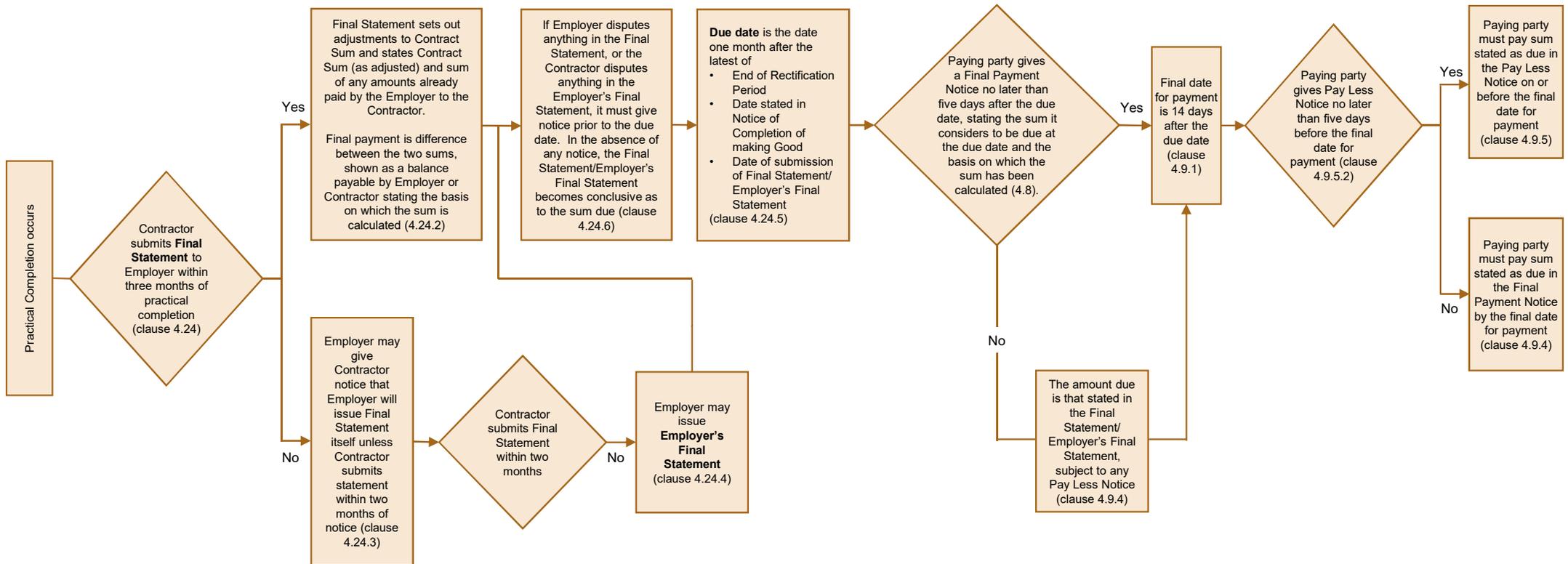
Final Payment

- ▶ Driven by Final Certificate from CA (SBC/Q) or Final Statement from Contractor (DB)
- ▶ Due date is one month after the latest of:
 - ▶ End of rectification period
 - ▶ Date of making good defects
 - ▶ Submission of Final Statement (DB cl 4.24) or notification of final adjustment (SBC/Q cl 4.26)
- ▶ Final date 14 days after due date

Final payment – SBC/Q



Final Payment - DB



Some apparent anomalies?

- ▶ Interaction of DB 2016 cl 1.8 and cl 4.24 – workable?
- ▶ Contractor's Final Statement > conclusive for certain purposes pursuant to cl 1.8
- ▶ Final Statement (FS) can be issued at any time after PC
- ▶ Contractor's Final Statement will necessarily assume conclusive effect as to the matters in clauses 1.8.1.1, 1.8.1.2 and 1.8.1.3 before the Employer is required to respond to it with a Final Payment Notice under clause 4.8, *unless* the Employer has previously issued proceedings challenging the Final Statement within 28 days after the date of issue of the Final Statement itself.
- ▶ Compare clause 4.9.4 - final payment to be made is the sum stated as due in the Employer's Final Payment Notice, subject only to the operation of any Pay Less Notice.

Payment frequency and debt recovery

- ▶ Payments post PC:
 - ▶ 2011 – 2 monthly intervals
 - ▶ 2016 – monthly after PC
- ▶ Debt recovery:
 - ▶ Notified sum is now automatically recoverable as a debt (cl 4.9.7)
 - ▶ Summary decree
 - ▶ Summary diligence

Loss and expense

- ▶ Different procedure introduced in 2016:
- ▶ Contractor to notify as soon as likely effect of a Relevant Matter ...becomes (should have become) reasonably apparent
- ▶ Contractor also to provide initial assessment of loss and expense incurred (and further anticipated amounts)
- ▶ Now also monthly updates also required until all information necessary to allow ascertainment has been supplied
- ▶ Employer to notify initial assessment within 28 days and update within 14 days of contractor updates

Finally...

Any questions?