

Te Kāhui
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For Discussion

Key industry documents under review
SCC 2023 and DZ3910



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Supporting industry discussions

Te Kāhui Whaihanga New Zealand Institute of Architects (NZIA) is proactively releasing its comparison of the key documents currently under review, Standard Construction Contract (SCC 2023) and DZ 3910:2023 Conditions of contract for building and civil engineering construction (DZ 3910).

This represents the Institute's thinking currently, and we welcome feedback to practice@nzia.co.nz.

The document may be updated over the next few weeks, and is likely to be the basis of NZIA's response to **Standards New Zealand on the Consultation Draft of DZ3910**.

Members and others are welcome to make use of the points and suggestions made in this document in their responses if they wish.

Introduction

This document has been prepared by Te Kāhui Whaihanga New Zealand Institute of Architects (NZIA) by taking DZ3910 (the MBIE consultation document) and comparing it with NZIA's draft SCC 2023 which is also out for member consultation.

The objective is to give NZIA members (and NZIA itself) points to use or refer to in responding to MBIE by the end of June. It also enables NZIA to identify points where it wishes to align with 3910, and those where it wishes to maintain a point of difference.

It is clear that as the contracts have been revised over the years, each has drawn on the other. This is probably the first time the contracts have been under review simultaneously.

No attempt is made to rank issues in order of significance, and some of the points noted are quite minor, but nevertheless noted so they do not get overlooked.

There are differences in approach;

- a. While each contract has a Principal and a

Contractor, NZIA's SCC has an Architect (which may be a firm) in the role of administering the Contract impartially.

(NZIA may produce a version of its SCC with a Contract Administrator in place of the Architect; for authorised use by those who are not NZIA members).

DZ3910 has a Contract Administrator and an Independent Certifier in the "middle". They must be individuals, and they can be the same person.

The Contract Administrator role is performed on behalf of the Principal, and the Independent Certifier must act impartially and independently of either party

(see clauses 6.1 and 6.2 of DZ3910); even if the roles are performed by the same individual.

There is an exception in both cases (driven by Construction Contracts Act requirements) such that the Architect and the Independent Certifier are each agents of the Principal in the administration of Payment Claims and Payment Schedules.

- b. DZ3910 introduces a further type of contract; "Target Price".

There is no equivalent in the SCC. NZIA is considering adding a Cost Plus Margin option.

- c. DZ3910 introduces a concept of "Specific Conditions". Special Conditions remain as amendments or additions to the General Conditions, and there is a new set of Special Conditions called Specific Conditions. Specific Conditions is a new term, but it refers to Schedule 1 which is an expanded list of variables, and a useful checklist; rather like the Contract Particulars in SCC 2023.
- d. SCC is often more detailed than DZ3910. See for example the insurance provisions, and H&S clauses. DZ3910 says parties and others must

comply with H&S law, while SCC sets out in some detail what is expected of them. There is no absolute right or wrong here, it is a matter of preference, and what users find more useful.

DZ3910 has the advantage of brevity and the disadvantage of not being comprehensive in approach. Arguably, SCC is the reverse.

More analysis could be done, particularly on pricing and payment aspects, but there is already a substantial amount of points to consider here, and practitioners with recent detailed experience of operating under the Contracts are best placed to comment on the appropriateness of those aspects.

underlying concept is still on-site overheads.

6. DZ3910, at 1.3.4, still refers to “Act or Regulation”. Presumably that is an oversight, because elsewhere (5.13.1 and 5.13.9(a)) the more appropriate term “statute, secondary legislation, instrument, or bylaw” is used. SCC 2023 is similar at clause 1.3.

In both cases it is important that changes to NZ Standards made during a contract are not automatically included. The changes may or may not have application to contracts already under way. Design work and pricing will have been done on then current standards, and changes should be directed as Variations if they are required.

Comments on Specific Provisions

Hierarchy of documents

1. Both contracts are made up of several documents. DZ3910, at clause 4 of the Contract Agreement specifies a hierarchy if there is ambiguity or conflict. SCC 2023, also at the Contract Agreement, lists the contract documents but the concept there, and at General Condition 3.2, is that the document that is latest in time prevails. In addition, there is a hierarchy in clause 3.2 for certain documents.

Definitions

2. DZ 3910, at 1.2 defines Resource Management Law as the RMA 1991. That will make it easier for the NBE Act and Spatial Planning Act to be added in due course. MfE has indicated the RMA 1991 will remain live for well over a decade. SCC 2023 could benefit from a similar approach, and DZ3910 might benefit from adopting the definition of Health and Safety Law in SCC 2023, at clause 1.1 which takes a similar approach.
3. DZ3910 defines “month” as a calendar month. That is not recommended for SCC 2023. It is confusing. For example, what is the end of the calendar month period that starts on 18 February, and what if it falls on Good Friday? More important, some months are effectively “shorter” than others; notably April when it contains both Easter and Anzac Day, and December/January. “Working Day” is the preferred term.
4. DZ3910 replaces “Off-Site Overheads and Profit” with “Margin”. Note that SCC 2023 retains the old term, and at clause 12.5.6(a) relating to Unforeseen Events, “Profit” has to be separately identified for that purpose only.
5. DZ3910 replaces “On-Site Overheads” with Preliminary and General, or P&G, but the

Measure and Value

7. DZ3910, clause 2.3.2 has not been amended but contains odd wording “as where other items of a similar kind have been included” that probably should be omitted. An error is either clear or it is not; those words do not help, and should not be decisive.

Bonds

8. DZ3910 allows “2 Months” for the Contractor to provide a Bond; 3.1.2. SCC 2023 requires the bond to be provided before work commences on site; 5.3.1. Both contracts say that no payments will be made to the Contractor unless the Bond is in place, so there is an incentive regardless of the allowed period in DZ3910.
9. DZ3910 at 3.2.3 has the concept of “required time” for provision of a Principal’s Bond, but since this is the Date of Acceptance of Tender it seems very early in the process. It is important, because failure entitles the Contractor to suspend work, and potentially initiate a default claim. The “required time” could be added to the Specific Conditions. SCC 2023, at 5.4.1(d) requires the Principal’s Bond to be provided before the Contractor starts work on the Site. It would be up to the Contractor whether it wanted to start off-Site work without the Principal’s bond in place.
10. DZ3910 at 2.10.3 usefully provides that a change of control of the Contractor amounts to an assignment, and so requires consent. That should be added to SCC 2023 at 20.5, even though 18.5 entitles the Principal to terminate the Contract if there has been a change of control of the Contractor to which the Principal has not consented in writing.
11. DZ3910 at 3.1.6 and 3.1.7 are not new, but do not seem appropriate. The effect is that the Contractor’s Bond expires at Practical Completion. Yet there may well be further work

to be done. DZ3910 recognises this explicitly at 5.7.3, and at 8.3.4(c) insurance must be maintained beyond PC and until the issue of the Final Completion Certificate.

SCC 2023, at 5.3.3, requires the Bond to be maintained until the defects completion certificate is issued.

The underlying problem seems to be that the narrow NZ bond market does not allow for “step down” of a bond at PC, or any other point, even though it may well be in the interests of both the Principal and the Contractor to do so.

This means that they will have to negotiate separately from DZ3910 and SCC 2023 to discharge the Bond at Practical Completion, and replace it with a smaller bond running until all works are completed and certified as such. Note that despite the problem with obtaining step-down bonds, that possibility is allowed for in SCC 2023 at 5.5.4.

12. More generally, it can be noted that DZ3910 provides for two bonds (one from each party), while SCC has four. The additional Contractor Bonds are a Deposit Bond and an Advance Payment Bond. Both contracts also allow for a Contractor's bond in lieu of retentions; DZ3910 at 12.3.6 and SCC 2023 at 5.5.
13. DZ3910 provides that the Surety must be identified in the Specific Conditions or approved by the other party. SCC permits bonds from any registered bank, as of right, or other providers approved by the other party.
14. The DZ3910 bonds (Schedules 3 and 4) are not clearly stated to be on demand and without reference to the bonded party. The SCC 2023 bonds are “on demand” (with a 5 Working Day lag), require a certificate from the Architect, and are generally more comprehensive as to what does not release the Surety, that the bond is for the benefit of the other party, and that they are assignable.

Contractor Standards

15. The basic standards applying to the Contractor differ between the 2 draft contracts, but perhaps not by much in practice;
 - a. DZ3910 states;
 - 5.1.1 In carrying out the Contract Works the Contractor shall complete, handover to the Principal, and remedy defects in the Contract Works and provide all services, labour, Materials, Plant, Temporary Works, transport, and everything whether of a temporary or permanent nature required so far as the necessity for the same is specified

in, or is to be inferred from the Contract.

The Contractor shall carry out the Contract Works with due care and diligence, in a proper and workmanlike manner with sound workmanship and materials, safely and in accordance with good industry practice. (NEW).

5.1.2 The Contractor shall comply with all Instructions issued by the Contract Administrator in relation to the Contract.

5.1.3 The Contractor shall be responsible for the adequacy, stability, and safety of all its Site operations and methods of construction, provided that the Contractor shall not be responsible for the design or specification of the Contract Works except as provided under 5.2.

b. SCC 2023 states;

2.1.1 The Contractor must carry out the Contract Works as required by the Contract Documents and must:

- (a) do so diligently and to the Architect's satisfaction;
- (b) complete the Contract Works safely and within the time required by the Contract;
- (c) complete the Contract Works in accordance with good industry practice for a Contractor skilled and experienced in that kind of Contract Works;
- (d) obtain all necessary consents and approvals as stated in clause 4.6; and
- (e) comply with all Acts, secondary legislation, instruments, bylaws, licences, and consents including instructions lawfully given under any of those documents.

Both refer to safety and good industry practice, and it may well be that a Court would say there is no material distinction between the 2 clauses overall. Readers may or may not agree; but if there are differences intended, they probably need to be spelled out more clearly.

Note also, that where the Contractor has design obligations, DZ3910, at 5.2.3 requires reasonable skill, care, and diligence. SCC2023 is the same (at 10.6) and goes on to state that review or approval by the Principal or Architect does not diminish that responsibility.

Principal warranties

16. DZ3910, at 5.1.4, has the Principal warranting that it has made available all information of which it is aware that has been obtained for the purpose of the Contract. There is no warranty as to the accuracy of the information. Arguably, that is too narrow, and should be an obligation to make available all information of which it is aware, regardless of the purpose for which it was obtained.

For example, the Principal may have known for years about the presence of buried asbestos or a naturally occurring spring, cavity or rock formation.

SCC 2023 is also not comprehensive:

Clause 8.2 requires survey marks to be shown. Clause 8.3 requires the Principal to disclose known utilities, but not known obstacles of other kinds.

Arguably, the obligations should be the same; and DZ3910, amended as suggested above, seems appropriate for both.

In both Contracts, the Contractor has the responsibility to assess the Site, but it should not be a game of hide-and-seek.

Site Supervisor and access

17. DZ3910 requires the Contractor to have a competent supervisor on-site at all working times; 5.3.1(a). SCC 2023 has no equivalent provision.
18. DZ3910 at 6.5.3 gives the Contract Administrator an explicit right of access to the Site. SCC 2023 could have that added to 8.5 which allows the Principal and others such access.

Separate Contractors and nominated subcontractors

19. Both contracts allow for Separate Contractors, who are the Principal's responsibility, though SCC 2023 is more comprehensive at 10.4 than is DZ3910 at 5.6.

SCC 2023, at 10.3, has a concept of nominated subcontractor. The Contractor is required to engage as its subcontractors any subcontractors nominated by the Principal, unless they fail to enter into an appropriate subcontract. Nominated subcontractors should be identified in the tender process, and so able to be subject to negotiation.

Access to and use of adjoining property

20. Use of adjoining property is dealt with rather differently. Note that this may be neighbouring

private land, but might also be roads or reserves for which councils typically charge, and may require traffic management plans.

DZ3910, at 5.5.3, says the Principal must arrange access and use that is necessary at the Principal's expense. Specific Conditions may limit access. Plus, of course, the Principal may simply be unable to negotiate access. If the Contractor chooses to use "other property" (presumably not strictly necessary for access or use), the Contractor must arrange and pay for that.

SCC2023, at 8.6, says the Principal must arrange (and presumably pay for) access to other property specified in the Contract Particulars. If that cannot be done, and the Contractor is not at fault, then the Contractor has a claim.

If the Contractor wants other access, it must arrange that at its cost unless the Contract expressly says otherwise.

DZ3910, at 5.5.6, requires making good of adjoining property at the Contractor's expense unless the damage has arisen from an excepted risk, which includes unavoidable result of carrying out the Contract Works and a range of uninsured and largely uninsurable risks. In those cases, the cost would shift to the Principal as a Variation.

SCC, at 8.6.3(d), requires making good, but costs are not claimable by the Contractor unless they are an inevitable consequence of the access or use.

In both cases there are timing issues because the need for access to other property, including extent and duration, may not become clear until Programmes (DZ3910; 5.12) or Construction Programmes (SCC 2023; 11.3) are in place. That occurs after the Contract has been executed.

Under both contracts, it is for the Contractor to decide how to carry out the Contract Works, unless there are constraints in the Contract. So, the Principal may face additional, unanticipated, costs unless access and use requirements for adjoining land are addressed in the contract negotiations.

General Obligations

21. Not all differences between clause 5 of DZ3910 and clause 8 of SCC 2023, are described here, but it can be noted that the SCC 2023 provision addresses Unforeseen Physical Conditions, and lists prohibited conduct and hours of work. DZ3910 addresses Unforeseen Physical Conditions at 9.5.

Clause 5 of DZ3910 is very lengthy, and covers subjects that are addressed in SCC2023 other

than at clause 8. For example, consents are at clause 4.

SCC2023 does not have the Management Plan concept found in DZ3910 at 5.19.

A critical path is mandatory in DZ3910 (5.12.4(b)), but optional in SCC 2023 at 11.3.2.

DZ3910 has significantly detailed requirements for “As-builts” at 5.20. There is no similar requirement in SCC 2023. (More comparative analysis might be warranted for these clauses).

22. Some minor points re DZ3910, clause 5;

- 5.7.5 has a stray “Engineer”
- It may be desirable to replicate, at 5.12, clause 11.3.5 of SCC 2023 (which needs “do not” removed) which says that the construction programme is not a Contract Document. Breaches are therefore not breaches of contract, and the contents do not imply Variations will be sought or granted. Possibly do the same for Management Plans at 5.19?
- 5.13.2 should be subject to 5.13.3, not 5.13.4; and 5.13.3 should end with “5.13.2”, not 5.13.3.
- Possibly 5.19.3 should only apply to parts of the Works that are subject to Management Plans? For example, a traffic management plan may not be needed in the early stages.

Safety Plans

23. Safety plans and their role with them are a risk area for Contract Administrators and Architects. Approval of an inadequate safety plan might expose them to liability under the H&S Act.

DZ3910, at 5.9, requires a safety plan from the Contractor, which is submitted to the Contract Administrator for acceptance. Compliance with the safety plan does not relieve the Contractor from its obligations under the Contract, which will include compliance with the H&S Act. 5.9.2 requires the safety plan to include any H&S requirements set out in the Contract. That should be extended include any requirements in the general law as well because; they may not be set out in the Contract.

SCC 2023, at 9.3, is more detailed, and describes what the plan must cover. It specifically states that the Contractor is responsible for its accuracy and adequacy. The Architect must review the plan, “to ensure that it contains no manifest errors or omissions that an Architect may reasonably be expected to find or know”.

Although the Architects’ standard is objective, it does appear that it would be harder to hold

an Architect liable for the consequences of a defective safety plan than it would be to capture a Contract Administrator who has “accepted” a safety plan; though 6.3.4 of DZ3910 may help.

There is a similar concern regarding acceptance of Management Plans by Contract Administrators under 5.19.2 of DZ3910.

That said, the wording can only protect parties so far, and cases like Whakaari/White Island, and others, show that Worksafe sometimes casts its prosecution net very wide.

SCC 2023 at 9.3.5 could have “reviewed by the Architect” removed, and both contracts would benefit from an explicit requirement for the Contractor to update the safety plan as circumstances change.

Right to object to individuals

- 24.** In DZ3910, the Contract Administrator and Independent Certifier (named individuals) will be known from the beginning as they are identified in the Specific Conditions, and the Contractor must accept them. The Contractor has some say in any change; see 6.1.3(d). The Contract Administrator can object to the Contractor’s Representative (5.3.2) and to employees on Site (5.4) Neither the Contractor nor the Contract Administrator or Independent Certifier can object to Advisers appointed by the Principal under 6.3.6.

In SCC 2023, the initial Architect (firm) and Architect’s Representative will be known but the Contractor can object to the Architect’s Representative (2.4.2), other consultants (2.5.2) and any change of Architect (2.6.2). The Architect can object to employees on Site (4.3)

Key Personnel

- 25.** SCC 2023 has a Key Personnel provision (4.4) that is not in DZ3910.

Standards for CAs, ICs, and Architects

- 26.** DZ3910 says the Contract Administrator and Independent Certifier must act without delay; 6.3.1. The standard for the Architect and Architect’s Representative under SCC 2023, at 2.3.2, is to act diligently. Perhaps both should use a broader standard such as “skill, care, and diligence”; see paragraph 15 above.

Urgent Work

- 27.** DZ3910 at 6.9.1 allows the Contract Administrator to instruct urgent work to be undertaken.

The circumstances should probably be extended to include actual or reasonably anticipated damage to the Works, Materials, or the Site. SCC 2023 has a more general provision at 10.9, with the initiative lying with the Contractor rather than the Architect.

happened, but not how it happened (whether negligently or otherwise.)

- 32. SCC 2023 seems preferable, because the construction insurance should be responding to damage irrespective of negligence.

SCC 2023 is arguably “fairer” than DZ3910 in so far as the indemnities each way in SCC 2023 do not require proof of negligence in either case.

Conversely, should the Principal’s indemnity only apply if the Principal is negligent or in breach of the Contract?

- 33. Complicating matters is that DZ 3910 also refers to the Contractor indemnifying for being in breach of contract. Contractual obligations on the Contractor include;

33.1 To “carry out the Contract Works with due care and diligence, in a proper and workman like manner with sound workmanship and materials, safely and in accordance with good industry practice “clause 5.1.1; and

33.2 To “be responsible for the adequacy, stability, and safety of all its Site operations and methods of construction.....” clause 5.1.3

- 34. Breach of those duties broadens the liability of the Contractor beyond negligence, but it is unclear by how much. A Principal would point to damage arising from the carrying out of the Contract Works and say that the fact of that is sufficient to establish breach of the duties described in paragraph 33. The contractor would counter that there is no breach without negligence.

- 35. The Contractor’s insurer will be watching with interest because regardless of the policy wording (which will likely not be limited to negligence or breach of contract) the insurer will only respond if the Contractor has a liability.

- 36. Either the new wording in clause 7.1.1 of DZ 3910 when considered in full does not have much effect, or it has an effect that is undesirable. A corresponding change to SCC 2023 is not intended.

- 37. DZ3910 should, at 7.1.2, exclude any indemnity for fines or infringement fees imposed on the Principal or Contract Administrator, because such indemnities are generally illegal as being contrary to public policy.

- 38. There are issues with both contracts in the way they define and allocate indemnities by reference to “excepted risks ” in 5.7.6 of DZ3910 and 10.7.2 of SCC 2023.

Indemnities and Liabilities

- 28. There are significant differences in the treatment of indemnities for injury or damage arising out of constructing the Contract Works.

- 29. Indemnities in these contracts are not well expressed, and it is difficult to discern consistent and appropriate principles running through the respective clause 7s.

Later in this paper (see paragraph 42) it is suggested that there is a case for entirely removing the indemnity provisions from both contracts, and instead just stating directly what each is liable for to the other; including where they are liable for the actions of third parties. The term “indemnity” clouds, rather than clarifies any analysis. Cross-referencing, rather than explicit provisions also results in inappropriate outcomes.

- 30. DZ3910 at 7.1.1(b) has the Contractor indemnifying for some matters arising from carrying out the Contract Works, but at 7.1.2(b) reverses that if the injury or damage was unavoidable.

If unavoidable, the Principal has to indemnify the Contractor.

SCC used to be similar, but in SCC 2023 at clause 7, the concept of unavoidable injury or damage has not been carried forward.

This is because it is considered inappropriate that the Contractor should be allowed to argue that the injury or damage it caused to some other person or property was unavoidable, and therefore the Principal must bear the consequences.

Anticipated injury or damage should be negotiated to be eliminated or minimised, not indemnified by the other party.

- 31. Clause 7.1.1 of DZ3910 also says the Contractor only indemnifies if negligent or in breach of Contract.

Clause 7.1.1 of SCC 2023 does not require the Principal to prove negligence of the Contractor; proof of damage is enough.

Since the Contractor has possession of the Site and conduct of the Works then except in extreme cases the Principal will know what

DZ3910 excludes from the Contractor's indemnity any risk referred to in 5.7.6, and that is appropriate.

Those risks are a mix of drastic third party actions (riot, radiation, etc) and actions of the Principal. The Principal does not indemnify the Contractor for injury or damage from any of those risks. The Principal should indemnify the Contractor for injury or damage arising from the risks in at least (d), (e), and (h) which are all related to matters for which the Principal is responsible.

SCC 2023 has the same issue, in reverse. 10.7.2 is a similar, though not identical, list of situations where the Contractor must make good.

Under 7.2.1 of SCC 2023, the Principal indemnifies the Contractor for injury or damage arising from all of the risks (except two, and one of those is a wrong cross-reference).

The Principal should indemnify for the risks in (c), (d), (i), and (j); and possibly (f) and (h) of 10.7.2.

39. Once decisions are made, it would surely be preferable to set out the Principal's indemnity risks directly in both 7.1.3 and 7.2.1 respectively? This seems to be a situation where targeted repetition is preferable to generalised cross-references? But see below at paragraph 42 for a more radical proposal.

40. Some other points re the indemnities in DZ3910;

- 7.1.2(a) carries forward the words "Contract Works" which seem to be a mistake, and should be "Principal"
- Consideration could be given to adopting clause 7.3 of SCC 2023 which has each party indemnifying the other party if the first party has caused a breach of any insurance, or failed to effect or maintain required insurance. That would align with 8.1.4(c) of DZ3910.
- There seems to be a case to copy SCC 2023, clause 7.6.1, which says the indemnities survive the Contract, because damage to third parties, for example, may take some time to become apparent.

41. In both cases, there are further problems for the Principal in the indemnity area;

- Some of the exposures are not likely to be insured, and if they are, the Principal will have to check that agreeing to indemnities for non-negligent conduct does not invalidate the insurance.
- As noted above, in neither case is the indemnity limited to situations where the Principal is negligent.

- The Principal indemnifies even if the damage is caused by a third party, or external event. That is the technical meaning of "indemnity", as found in insurance; A and B have a contract, and Insurer says to A that it will pay A if B causes damage to A; but Insurer is not party to the contract between A and B.

- The Public Finance Act makes it difficult for some Principals to give indemnities, but as noted above any Principal (or indeed Contractor) giving an indemnity under these contracts needs to get assurance that if they do have insurance, that insurance is not affected by the giving of indemnities.

42. Conclusion. There seems to be a strong case for setting aside the indemnity clauses in both contracts and starting afresh from basic principles, namely;

- What should the Contractor be liable to the Principal for?
- What should the Principal be liable to the Contractor for?
- What liabilities should only arise if the party has been negligent?
- To what extent should either party be liable to the other for actions of third parties not under its control, or external events?

Contractor Liability Limit (optional)

43. Both contracts share a commonly developed Contractor Liability Limitation. It is optional, but carefully crafted, so where a Contractor wants and can negotiate a limit, these clauses should be used.

Insurances

44. Generally it is difficult to compare the insurance provisions of the two contracts, because the requirements are spread between General Conditions, Specific Conditions/Contract Particulars, and Schedules.

45. There is a fundamental issue that affects both SCC 2023 and DZ3910 (and the current standard contracts).

It is simple to state, but hard to resolve. Understandably, participants do not want to analyse and reconcile construction contracts and insurance policies, but at some point Principals, Contractors, Architects, Contract Administrators, Brokers and Insurers need to address;

WHO IS RESPONSIBLE FOR ENSURING THAT THE INSURANCE POLICIES COMPLY WITH THE CONTRACT?

46. The issue is complicated by the reluctance of insurers to allow policy wording to be disclosed. In some cases, such as CW, PL, and MV policies, the various products can be found on-line, so their secrecy is misplaced.

In others, notably PI, and it seems Statutory Liability, the policy is more likely to be bespoke, and insurers do not want the wording made available.

Especially not to someone who might be bringing claims against their insured. It is usually easy to tell when an insurer has taken over defence of a PI claim, but typically the fiction is maintained that the defendant is to be judged on their conduct, not the extent of their insurance.

One can have some sympathy for this long-standing practice, but it does make establishing the adequacy of the insurance at the beginning of the contract more difficult.

47. For simplicity, take the typical case where the Contractor has to put all the insurances in place.

Under SCC 2023 at 6.1.8(a) and DZ3910 at 8.1.4(c), failure to put required insurance in place leaves the obligated party liable for any loss (and in the case of SCC 2023, an indemnity applies)

So, the Contractor will ask their insurer, or their broker, to confirm that the insurance policies that are being issued to them and paid for by them (and ultimately the Principal) comply with SCC 2023 or DZ3910, as appropriate.

These construction contracts are only revised every decade or so, and Contractors might expect that insurers can design compliant policies?

That would mean that only where Special Conditions changed the default terms would specific analysis be required.

Local insurers may indeed be constrained in what they can do by the requirements of their overseas owners and reinsurers, but if the reinsurers were engaged at the outset, and policies and standard contracts were aligned, then that issue should disappear.

48. That leaves satisfying the insurance requirements to the Contractor, and a prudent Contractor might well go to their broker for confirmation of compliance (except, perhaps, in cases of very large Contractors who have permanent policies in place; as contemplated by SCC at 6.3.5)

However, the insurance schedules in DZ3910

confirming cover and issued by either the insurer or the broker all state;

“We do not warrant that this policy complies with the requirements of NZS: 2013”.

They even state that for the PI policy, whose terms they will not reveal.

SCC 2023 does not have an equivalent provision, but can it be expected that brokers/insurers would take a similar approach, and refuse to give confirmation if asked?

49. That leaves the Principal protected only by the indemnity in SCC 2023 at 6.1.8 and 7.3.2, which the Contractor might not be good for, and with the right to be satisfied that the terms are acceptable; 6.1.2(c). NZACS wants to say that right does not entitle the Principal to see the insurance terms, and presumably they and other brokers/insurers will object to DZ3910 clauses 8.2.7 and 8.7.6 and SCC 2023 clause 6.2.2, under which production of policies can be required?
50. The further problem for NZIA is that its Principals are quite likely to ask their Architect either whether the policy wording or sums insured are acceptable, or for a general assurance that all insurance is in place. The Principal might even argue that they were entitled to assume that the insurances were in place because the Architect has granted the Contractor access to the Site (8.1.4) and/or has not suspended work under 6.13. SCC 2023 at 6.1.2(c) says the insurance must be acceptable to the other party (acting reasonably). While footnotes can make it clear that the Principal has the ultimate responsibility to accept or reject insurance, they may well turn to their Architect for advice?
51. Contract Administrators may well face similar issues? DZ3910 requires information to be deposited with the Contract Administrator from brokers or insurers that all required insurance is in force. But that must be done in the form set out in the Schedules, and the Schedules have the disclaimer described in paragraph 48 above embedded in them. So, how does the Contract Administrator satisfy their Principal that complying insurance is in force?

Possibly, Architects and Contract Administrators have to tell their Principals to seek advice from brokers engaged by the Principal; but will those brokers take on that role, and what can they be expected to do if they are not allowed to see the proposed policies?

There are some very practical concerns here. For example, NZIA was told that immediately after the Conference Centre fire, insurers reacted by adding “hot work” exclusions to all CW contracts. After a while, they dropped the exclusion.

But for some time there were insurance contracts in the market with hot work exclusions; some might still be in force? The Contractor’s broker should have told the Contractor, and the Contractor should have told the Principal (ideally via the Architect or Contract Administrator, who might have suspended hot work if feasible); but did that actually happen?

52. Sponsors of each contract have taken advice from brokers, and in the case of NZIA members they have been asked to check with their own brokers to ensure that they can access policies that match the contractual requirements. In an ideal world, there would be more than one complying policy of each kind available.

53. It is fair to say that the insurance provisions in both contracts are still a work-in progress; however, some observations can be made;

- A sentence is added to 8.1.2 of DZ3910 that says the consequences of any failure to notify a change in insurance are borne by the party who arranged the insurance. That party might not be the cause of the failure, and the cost should be the responsibility of the party that failed to give the notice.
- NZIA were advised that where the Principal is required to effect construction or Contract Works insurance (CW insurance), the Principal should also have to effect the Public Liability insurance (PL insurance). They should not be split. The Principal usually effects construction insurance in situations where the Works involve existing buildings or structures of the Principal and so there would usually be a property insurance and public liability insurance policy or policies held by the Principal. Overlaying those with different policies effected by the Contractor is seen as problematic.
- This is given effect at 6.10 of SCC 2023.
- If DZ3910 is to follow suit, 8.9 would need attention.
- 8.2.3 of DZ3910 probably should follow 6.1.2(e) of SCC 2023 so that while the Principal and the Contractor are severally insured for CW and PL insurance, the amount of cover is not doubled.
- Conversely, SCC 2023 of 6.1.2 (e) could say that the actions of one insured does not

affect the rights of the other.

- DZ3910 does not seem to prohibit averaging; see 6.1.2(f) of SCC 2023.
- The forces of nature specified are the same. However they must be covered in SCC 2023 (6.1.7) while they are optional in DZ3910 (Specific Conditions at 8.1.6)
- DZ3910 does not seem to specifically state that the CW and other insurance must include the acts and omissions of subcontractors. SCC 2023 does, at 6.1.13, 6.3.2 and 10.2.5; and see 6.14.
- DZ3910 allows insurances to exclude liquidated damages. SCC 2023 is silent on the point. In some cases, eg. PL insurance it is difficult to see how liquidated damages could arise anyway, but if the Principal is entitled to more by way of liquidated damages than it can deduct from payments to the Contractor under clause 11.9 of SCC 2023, then having liquidated damages covered by CW insurance seems appropriate (if that is possible?).
- The reference in 8.6.3 of DZ3910 to 5.1.4 should be to 5.2.3.
- In DZ3910 8.2.7 the words “named insured” probably should be “an insured or named”?
- NZIA should consider whether to allow the exclusion contemplated by 8.3.5(c) of DZ3910 relating to defective Materials, wear and tear, etc.
- DZ3910 at 8.3.2 changes “notes” to “insures” for persons with interests in insured matters. Is that correct where the person is a mortgagee or has a security interest? Are such interests insurable, or are they merely noted on the policy as having an interest in the insured property?
- DZ3910 does not seem to require Statutory Liability insurance? Perhaps it is to be incorporated in some other policy, but that is not clear? (Noted that Schedule 1 Part 6, of SCC 2023 relating to Statutory Liability insurance needs correction because wording relating to “Construction Plant” has crept in!!).
- SCC 2023 6.1.4 has been recommended to be removed on the grounds that it extends liability beyond insured amounts, although liability is not generally limited to insured amounts. That is one reason why Liability Caps (DZ3910 at 7.2 and SCC 2023 at 7.4) are being added as options.

The second sentence is reasonable, but (except as to contribution) will be covered by 6.1.8

54. The Specific Conditions in DZ3910 and the Contract Particulars in SCC 2023 serve similar functions, as do the Schedules relating to insurance.
55. If the second point in paragraph 53 above is adopted, then where the Principal arranges CW insurance, it would also have to arrange PL insurance; the latter would not be optional.
56. Also, as noted there, the forces of nature to be covered are options in DZ3910 but compulsory in SCC 2023.
57. Neither contract seems to have either in the SC/CPs or (preferably) Schedules provision to note that the interests of other persons actually have been recorded by the insurer. That is more relevant to some than others; not relevant to PL cover, but there could well be financiers' interests in MV and Plant policies, plus, of course, there might be mortgages on the Principal's property and charges over the Contractor's assets.
58. There are differences as to what is confirmed by the insurer or broker. To take the CW Schedules (Schedule 7 of DZ3910 and Schedule 1 of SCC 2023) as examples, the following differences can be noted. Their significance may be no more than a matter of opinion, at least in some cases;
 - The options for forces of nature are listed in DZ3910, but not in SCC 2023 because they are not optional there. SCC 2023 does have confirmation that they are all covered.
 - There are more separate sums insured in SCC 2023.
 - Both say the sums are GST exclusive, but SCC 2023 increases the sums insured by 15% if the Principal is not GST registered.
 - SCC 2023 recognises that there may be sub-limits for off-site and vacant site coverage.
 - Subrogation is addressed differently. DZ3910 says there will be no delay due to subrogation, while SCC 2023 says that there is no subrogation as between Principal and Contractor.
 - SCC 2023 has the insurer/broker confirming that CW policies are not subject to average and subcontractors are covered as if they were the Contractor, if the subcontractor's insurance does not respond. The second point should also be in the PL insurance information. There are no equivalents in the DZ3910 Schedules.

- PI insurance has a 6-year run off: DZ3910 at 8.6.3 and SCC 2023 at 6.7.12. Arguably the same should apply to Statutory Liability. There is less of a case for that in respect of other policies.

Extensions of Time

59. Both contracts address the vexing issues around the timing and determination of claims for extensions of time. Neither imposes an absolute time bar leading to claims being disallowed for lateness; but there are time expectations, and in the case of DZ3910 at 10.3.6 late notification can be considered in determining entitlement if timely notification would have lessened the impact.
60. SCC 2023 does not entitle the Architect to take the impact of any late notification into account; and that could be added.
61. DZ3910 expressly allows the Contract Administrator to direct acceleration, but only if the parties agree. SCC 2023 discusses acceleration in a footnote at 11.5.6, but some of that should be moved into the contract itself for clarity.
62. One notable difference is that DZ3910 does not address concurrent causes of delay, while SCC 2023, at 11.7, says the Contractor only gets an extension if it is not responsible for any of the causes.
63. The Contractor's initial obligation to give notice differs both as to the trigger and the time allowed for the giving of notice;
 - DZ3910 requires the Contractor to give notice within 20 working days of becoming aware of the circumstances relied upon for the extension, and if the period sought is not specified there, then it must be given within a reasonable time (10.3.2). What is unclear is whether the "circumstances" are the event (such as flood or damage to Works or Materials), or the realisation that an extension of time might be required because of the event. So, there might still be "just in case" notices being given?
 - SCC 2023 has two 10 working day periods, with the Architect allowed to extend the second deadline for the period of extension claimed (11.5.2 & 11.5.3). The first period starts when the Contractor becomes aware that progress is likely to be delayed, which could be some time after the event that causes the delay. It could also have an Architect's discretion to extend the first 10 day period also

Variations

- 64.** Both Contracts, unsurprisingly, have detailed provisions for claiming and valuing Variations. Comparing the wording of each is probably not very productive, though practitioners might like to work through a practical example under each Contract, and see whether the outcome is the same, or at least close.

Daywork

- 65.** DZ3910 has a concept of Daywork, which is not in SCC 2023.

Unforeseen Physical Conditions

- 66.** Both address Unforeseen Physical Conditions; DZ3910 at 9.5 under “Variations”, and SCC at 8.7 under “Site”.

Unforeseen Events (SCC 2023 only)

- 67.** There is a significant difference in that SCC at 12.5 introduces the concept of an “Unforeseen Event”. The impetus for this came from the impact of Covid and Covid restrictions and the debate in the sector and by clients. NZIA has introduced clause 12.5 which would cover Pandemic Events, but importantly much more. Because 12.5 is new, some explanation is warranted.

- 68.** See first the definition in clause 1.1 of “Unforeseen Event” which incorporates definitions of “Unforeseeable Delay or Lack of Resources” (including “Pandemic Event” effects), “Unforeseeable Physical Conditions” and “Unforeseeable Weather Conditions”). Pandemic Events and their effects may be in decline for now at least, but other Unforeseen Events seem to be proliferating; ships blocking the Suez Canal or breaking down closer to home; repeated extreme weather events affecting many contracts and the Materials and infrastructure vital to complete them covering most of the country north of Taupō.

- 69.** It should be noted that this concept will likely cause greater attention to be paid to Construction Programmes and critical paths. If something is contemplated in them it will be difficult to argue it is Unforeseen, but they may set the parameters for foreseeability?

- 70.** Under clause 12.5 of SCC 2023 if either party believes an Unforeseen Event has occurred or is likely to occur, the Contractor must keep the Principal and Architect informed about actual or likely effects on progress, price, and programmes; and take reasonable mitigation steps. Note that either party can activate the clause, and the other cannot opt out.

- 71.** The parties must engage to consider avoiding adverse effects, including by innovation, minimise the effects on the Contractor and subcontractors, and maintain the viability of the project contemplated by the Contract; SCC 2023 at clause 12.5.3. One might hope that much of that would happen anyway, but clause 12.5 provides a framework to invoke when matters may well be fraught.

- 72.** Outcomes may include an extension of time, an increase in Cost but not time, or fluctuations.

- 73.** The value of Unforeseen Event Variation related Costs is determined under clause 12.5.6 which has the following features;

- The Contractor gets paid actual costs for demobilisation, loss of Site access, making safe, and reconfiguring the Works. Notably also for the impact on its supply chain. Payments include On-Site Overheads, and Off-Site Overheads, but not the Profit component (which must be stated for this purpose in the Contract Particulars)
- Payments are reduced by financial support received from central or local government. It is acknowledged that this may well cause dispute because the financial support may in some cases not be contract-specific. But something like a wage subsidy must be factored in.
- The Contractor must allow Unforeseen Event Variations to be assessed on an open book basis.

- 74.** Under clause 12.5.8, when assessing claims for an extension of time, or costs, the Architect is required to take into account;

- What a reasonable Contractor would have done by way of mitigation, including in advance
- If any delay in giving notice has contributed by limiting options
- Whether the Principal has contributed to actions not being taken by the Contractor. The example given is the Principal refusing to agree to advance payments so that the Contractor could mitigate supply chain risk.

- 75.** Extensions of Time for Unforeseen Events are addressed at clause 1.5.1(l) so long as clause 12.5 has been complied with.

Collaboration generally

- 76.** This is probably as good a place as any to compare the contracts as they relate to collaboration between the parties, and related obligations. Neither contract falls into alliancing

territory, but each has clauses designed to avoid adversarial stances being taken. Each has a combination of explicit requirements and incentives.

77. Of note in DZ3910:

- The Target Price concept (2.5) can be regarded as collaborative in the sense that price overruns and savings are shared on an agreed basis.
- The explicit reporting obligation in 5.22 is new, though both contracts require construction programmes to be established and updated.
- There is a new early warning obligation on each party at 6.10.
- There is an incentive on the Contractor to give early notice of the need for an extension of time, and to take mitigation steps (10.3.6). Also 10.3.4 has an explicit requirement to meet to try to resolve extension of time claims.
- Before formal dispute resolution processes begin, the parties must negotiate in good faith at a senior level (13.1.1).

78. Of note in SCC 2023:

- There is an extensive advance notice or “no surprises” clause at 2.7.
- Conflicts of interest by the parties or the Architect must be communicated to the others with a plan to address the conflict; 2.9.
- Collaboration runs right through the Unforeseen Events provisions at clause 12 (described above)
- There is a reporting and mitigation obligation relating to extensions of time at 11.5.2, though no power there for the Architect to adjust payments for failure to comply. Cost Reimbursable Sums may be disallowed if the Contractor did not give an early warning that should have been given; 13.6.3(e).
- There is no express obligation to negotiate before invoking the disputes process at clause 19 (that could usefully be added). Either party can require mediation, while under DZ3910 the parties only mediate if they agree to do so.

5 Working Days in SCC 2023 at 16.3.1, but with its being provisional for 10 Working Days; see 16.4.2.

Both have 17 Working Day limits for payment calculated from the Payment Claim date; DZ3910 at 12.1.3(c) and SCC 2023 at 16.7.1, though SCC has an extension relating to GST invoice requirements (16.13.4).

80. A significant new provision in DZ3910 that has no equivalent in SCC 2023 is the introduction of an Interim Final Account and Final Account at 9.11.

Neither is a Payment Claim, but the Final Account leads to the Final Payment Claim once it is agreed.

The intended effect appears to be to enable Contractors with contracts that have reached at least Practical Completion to get paid at least some of what they will ultimately be entitled to under the Final Payment Claim and Schedule earlier than under that process because it can be subject to delay, and non-payment because of matters whose value is out of proportion to the amount outstanding.

Contractors might seek something similar under SCC 2023, and, if agreed to, it will have to be achieved by Special Condition unless SCC 2023 is amended either for all situations (as in DZ3910) or as an option.

Retentions

81. The Construction Contracts (Retention Money) Amendment Act 2023, which comes into force in October imposes trust obligations on parties who make retentions. There is no need to repeat them in either contract, but they should be acknowledged. SCC 2023 does this fairly comprehensively, and because this is often a cause of tension, requires both Principal and Contractor to provide proof of compliance to the other and the Architect if requested.

No contractual consequences follow. DZ3910 mentions only the Principal’s obligation to comply with the CCA.

82. Both contracts (DZ3910 at 12.3 and SCC 2023 at 16.11) have similar provisions for release of retentions at Practical Completion, with contractually described amounts to be further retained until the Final Completion Certificate or Defects Completion Certificate has been issued.

83. It may be that the requirements of the Act will see an increase in Principals requiring Retention Bonds rather than engaging in the trusts process, though the cost of the bond will come through to the Principal via the Contract Price somewhere. As between Contractors and subcontractors the position may be different?

Payment Claims & Payment Schedules

79. The contracts have different dates for the issuing of Payment Schedules counting from the date of receiving the Payment Claim. 12 Working Days in DZ3910 at 12.2., but with a provisional Payment Schedule within 7 Working Days.

Dispute Processes

84. DZ3910 is necessarily more complex because of the split roles of the Contract Administrator and Independent Certifier (even though they may be the same person).
85. As noted above, DZ3910 at 13 has a compulsory good faith negotiation provision, while SCC3910 does not; although the Architect is required to engage with the parties to the extent reasonably practicable (19.3.3) in making a decision about a dispute. DZ3910 also has a necessary process for disputes between either party and the Contract Administrator about their Instructions and Decisions (not being Final Decisions) of the Independent Certifier to be referred or returned to the Independent Certifier; see 6.3.5 to 6.4.7. A request for a Final Decision can break the circle of reviews.
86. DZ3910 (6.4.7) allows the parties to agree to refer a matter to an agreed expert to help resolve any matter. As with the compulsory negotiation provision, SCC 2023 does not have an equivalent. Arguably neither is required because parties can agree any process they like at any time; and if they do not agree, the process will be futile. However, there are some advantages in having those matters spelled out because unreasonable failure to engage can be relevant in subsequent stages.
87. Returning to the disputes clauses themselves, the most striking difference is that SCC prescribes time limits for various stages, and provides for appointments of mediators and arbitrators if the parties cannot agree. SCC at 19.2 recognises that the party may agree to suspend the dispute process under the CCA. That may be implicit in DZ3910 at 13.1.2(b)?

Frustration and Termination generally

88. The frustration and termination provisions are broadly similar; though SCC 2023 deals with suspension there at 18.4, while DZ3910 does that at 6.8.
SCC 2023 is more comprehensive than DZ3910, and requires notice to be given to the Contractor in some situations so defaults may be rectified; 18.6.
DZ3910 specifically addresses liquidated damages continuing to apply in some cases at 14.2.5. SCC 2023 does not.
89. DZ3910 might consider adopting 18.8.3 of SCC 2023 which links to section 67 of the Contracts and Commercial Law Act 2017. It requires Courts to give effect to relevant provisions in the contract ahead of some of those in that Act.
90. Similarly, DZ3910 at 15 might consider adopting 20.8 of SCC 2023 regarding notices. Additional

points there include specifically addressing the Construction Contracts Act requirements, and deemed delivery of electronic messages.

Miscellaneous Matters

91. DZ3910 might find some or all of SCC 2023 clauses 2012 to 14, and 20.17, which deal with privacy, confidentiality, photography, and the Principal as a regulator, worth including? Possibly those, and SCC 2023 clauses 8.9 and 8.10 are considered too detailed, but their inclusion may help reduce the generation of some “standard” Special Conditions?

Fluctuations

92. Appendix A of DZ3910 addresses Cost Fluctuations in indexation terms, while SCC 2023, at Schedule 4 has three provisions for both evidential and formulaic fluctuations.

Warranties

93. Both contracts address contractor warranties; DZ3910 at Schedule 13, and SCC 3910 at Schedule 10. They have been aligned, with the important distinction that DZ3910 is a subcontractors warranty only, while SCC 2023 is both a Contractors and subcontractors warranty.
94. More generally, there are 3 kinds of warranties, and conceptually they are quite separate.
 - A warranty from the Contractor, and/or from an outside agency like Master Builders. At least in the case of those Third Party warranties (or guarantees), they should be in place before Works commence, though it may be appropriate to follow the process for other protections such as bonds and insurances and just say the Contractor gets no payments unless they are in place; see, for example SCC 2023 at 16.2.2 .
As noted above, DZ3910 has changed to have a Subcontractor’s warranty only, though a Contractor’s warranty could be required in the Specific Conditions; see DZ3910 at 11.5, and seemingly one is required from the Contractor where the Contractor has actually carried out a “relevant trade”; see 11.5.3 .
 - Subcontractor warranties; DZ3910, Schedule 13 and SCC 2023, Schedule 10. These are given after the relevant Work is completed.
 - Supplier warranties which can cover everything from tanking or cladding actually built into the contract Works, to product warranties for appliances; SCC 2023 Schedule 11.

- 95.** Finally on this subject there is an issue as to whether either or both contracts should contain options for parent companies of contractors to provide guarantees, or whether that is a matter best left to Special Conditions?

Points to keep in mind are that if the Contractor is a 50/50 (or less) JV, then it is not a subsidiary of either “parent company” and might have been created deliberately to limit liability. Also, franchise structures typically do not fit that model, and franchisors are unlikely to give guarantees, as are the shareholders of franchisees.

Advance payments and Principal supplied items

- 96.** DZ3910 does not seem to have explicit provisions for Advance Payments or Principal supplied items, (Schedules 7 and 9 of SCC 2023) but they could be added as Special Conditions if required. Advance Payments are central to the next point in many cases.

Security for Off-Site Materials

- 97.** Both contracts have closely aligned Agreements for Security for Off-Site Materials; D3910 at Schedule 10, and SCC 2023 at Schedule 8. SCC 2023 also has detailed Guidance Notes (3 pages) explaining critical points, and limitations. It may be desirable to add a note to confirm that the method and duration of storage will not affect any manufacturers warranties.

This area, along with insurance is one of the highest risk areas for Contract Administrators and Architects, or anyone advising Principals as their clients. The need for these agreements is likely to increase with advance purchases occurring to lock in prices and reduce supply chain risk, manufacturers requiring significant deposits before producing bespoke product, and construction methods that involve more work being performed off-Site. DZ3910 may want to consider whether the obligation to identify and separate materials at clause 4 should lie with the Bailee not the Contractor, and whether the Contract Administrator should have the benefit of SCC 2023 clause 26.

NZIA took specialist legal advice on Schedule 8 of SCC 2023, and will be encouraging its members to use that Schedule, and pay close attention to the extensive Guidance Notes relating to it, irrespective of whether they are advising on or using SCC 2023 or NZS3910.

Certificates

- 98.** DZ3910 contains Practical Completion and Final Completion Certificates at Schedules 16 and 16. Those for SCC 2023 are rather more

comprehensive, and there are additional forms, at the Contracts Administration Forms section at the very end of SCC 2023.

Tendering points

- 99.** DZ3910 prescribes Conditions of Tendering. So does SCC 2023, which also has a fairly comprehensive Tender Submission Form.

SCC 2023 has provisions contemplating electronic tendering, a tender validity period, and an express statement that tenderers have no rights other than to be evaluated fairly.

DZ3910 might expect Principals to deal with such matters elsewhere in the Tender Documents, where they might also consider SCC 2023 clauses 5.7 and 5.8 which allow the Architect a discretion to receive late tenders if satisfied there is no prejudice to others, and a similar discretion to allow correction of manifest errors in special circumstances.

These provisions were added to SCC to recognise that it may not be in the interest of Principals to have potentially attractive tenders ruled out on technicalities, while still maintaining integrity of the process.