

The Users' Perceptions on the Impartiality of the Engineer under the FIDIC Red Book in the UAE

**مفهوم حيادية المهندس من قبل مستخدمي كتاب "FIDIC RED BOOK"
بدولة الإمارات العربية المتحدة**

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The thesis of this research had been chosen for the extent of controversy around the role of the Engineer under the FIDIC Red Book. UAE construction industry was the key object of the study and the study largely relied on the fieldwork. This study is unique in a sense that there were no attempts to tackle this topic in the context of the UAE.

The research offered in-depth analysis of the perception of the Engineer's impartiality by the users of FIDIC Red Book in the UAE, namely the Employers and the Contractors. The study also analyzed some key relevant provisions of the FIDIC Red Book. Finally, the study offered various solutions to overcome the issue with the impartiality.

The findings suggest that the majority of the Red Book users in the UAE do not perceive the Engineer as an impartial body under the contract. Based on these findings, the recommendations on the next steps that could be undertaken and that may serve as a thesis for further research were proposed. It is hoped that the FIDIC drafters may consider the findings of this study in order to further improve the efficiency of the key provisions in the FIDIC Red Book.

لقد تم إختيار أطروحة هذا البحث لمدى الجدل الدائر حول دور المهندس بموجب كتاب FIDIC RED BOOK . وكان لقطاع التشييد والبناء بدولة الإمارات العربية المتحدة العامل الرئيسي لهذه الدراسة ، وقد اعتمدت هذه الدراسة بشكل اساسى على العمل الميداني . تعتبر هذه الدراسة فريدة من نوعها بمعنى أنه لم تكن هناك محاولات لمعالجة هذا الموضوع في دولة الإمارات العربية المتحدة من قبل.

البحوث المقدمة عرضت بتحليل معمق مفهوم حيادية المهندس من قبل مستخدمي كتاب FIDIC RED BOOK بدولة الإمارات العربية المتحدة ، وبالتحديد أصحاب العمل والمقاولين . كما أنه ومن خلال هذه الدراسة تم تحليل بعض الأحكام ذات الصلة بكتاب FIDIC RED BOOK . أخيراً ، هذه الدراسة عرضت بعض الحلول لتخطي مسألة الحياد.

وتشير نتائج البحث إلى أن الغالبية العظمى من مستخدمي كتاب FIDIC RED BOOK في دولة الإمارات العربية المتحدة لا ينظرون إلى المهندس كهيئة محايدة بموجب العقد المبرم، وبناءً على هذه النتائج ، لقد تم إقتراح توصيات للخطوات المقبلة التي يمكن اتخاذها والتي قد تكون بمثابة أطروحة لمزيد من البحث. على أمل أن تعيد لجنة صياغة FIDIC النظر بنتائج هذه الدراسة من أجل تحسين الكفاءة بما يتعلق بالأحكام الرئيسية لكتاب FIDIC RED BOOK.

Table of Contents

1. Introduction.....	5
1.1 General Background	5
1.2 Research Problem	7
1.3 Research Questions.....	8
1.4 Aim and Objectives.....	9
1.5 Research Methods.....	9
1.6 Significance of Research.....	10
1.7 Dissertation Outline	10
2. Impartiality of the Engineer under the FIDIC Red Book	12
2.1 Introduction.....	12
2.2 A great debate	12
2.3 The dual role of the Engineer.....	13
2.4 Red Book 1987 vs. Red Book 1999.....	13
2.5 ‘‘Issues’’ with the discretion.....	15
2.6 The requirement for consulting with both parties: the real outcome	17
2.7 Engineer under JCT, ICE and NEC form of contract	17
2.8 Conclusion	19
3. Research Methodology	21
4. Data Analysis	24
4.1 General overview of the use of FIDIC contract form in the UAE.....	24
4.1.1 Findings based on the interviews with the Contractors	24
4.1.2 Findings based on the interviews with the Developers.....	25
4.2 Contract Disputes and the Engineer: impartiality – a myth or a reality?	27
4.2.1 Findings based on the interviews with the Contractors	27
4.2.2 Findings based on the interviews with the Developers.....	34
4.3 Impartiality and the lack of it: Reasons, Examples and Consequences	37
4.3.1 Findings based on the interviews with the Contractors	37
4.3.2 Findings based on the interviews with the Developers.....	39
4.4 Conclusion	40
5. Discussions	43
5.1 Introduction.....	43
5.2 Discussion on the solutions proposed by the participants.....	43
5.3 Conclusion	51
6. Conclusions and Recommendations	54
6.1 Conclusions.....	54

6.2 Recommendations for Further Improvements	59
6.3 Recommendations for Future Research	60
7. Bibliography	61
Appendix A – Interview Questions	

List of Tables

Table 1 - Coding System.....	23
Table 2 - List of Clauses modified in the FIDIC Red Book 1987 edn.....	25
Table 3 - List of Clauses modified in the FIDIC Red Book 1999 edn.....	26
Table 4 - Nature of disputes related to the Engineer’ own conduct.....	31

List of Charts

Chart 1 - Main Professional Background of the Respondents.....	20
Chart 2 – Years of experience in the Construction Industry (Contractors).....	21
Chart 3 – Years of experience in the Construction Industry (Developers)	21
Chart 4 - Contractors’ Level of Satisfaction with the Engineer’s determination.....	25

1. Introduction

1.1 General Background

FIDIC Standard forms of Contract are largely used in the UAE and worldwide. Although they are known for being fair towards the contracting parties, there are still some points of controversy and openness to interpretation.¹ For example, it is the extent of risks that are transferred to the Contractor under the Silver Book, the requirement of sub-clause 20.1 of the Red Book 1999 edition that calls for the Contractor to submit a notice that serves as a condition precedent to the entitlement to any claim under the contract, the notion of “unforeseeable” conditions under FIDIC, and the traditional role of the Engineer prior to introduction of the Dispute Adjudication Board (DAB).²

Widespread concerns have often been raised over the impartiality of the Engineer due to his contractual engagement with the Employer.³ The dual role of the Engineer under 4th Edition of the Red Book was heavily criticised over the years.⁴ A survey⁵ conducted in the UK prior to the release of the Red Book 1999 edition revealed that the role of the Engineer under FIDIC was considered one of its worst features. Similar concerns were also reported during the workshop held in February 2005 by FIDIC-NET Network in the University of Reading, UK, where the general conditions of the FIDIC Red Book as well as drafting of the particular conditions were discussed. More recently, a research⁶ conducted by EC Harris in 2010 illustrated that the Engineer’s (and the Project Manager’s) conduct was found to be at the core of fifty three percent of Joint Venture disputes globally. One of the main reasons was found to be the Engineer’s partiality towards the Employer.

The results of a survey conducted by Reading University also demonstrated that the role of the Engineer under FIDIC was causing debates in the industry. Fifty percent of the respondents opined that the Engineer should be more impartial, whilst the rest

¹ B Barr, *FIDIC Users' Guide* (3rd edn, 2013).

² P Battrick and P Duggan, ‘The rainbow suite. The 1999 FIDIC suite part 8’ (2011) CES.

³ F Reilly and A Tweeddale, ‘FIDIC's New Suite of Contracts’ (2000) 16 (3) CLJ 187-198.

⁴ ‘A Network of Experts/ Users of the FIDIC Contracts. Contract Formation: Report of First Workshop, by FIDIC-NET Network’ [2005] University of Reading.

⁵ EIC/FIDIC Questionnaire Survey: ‘The use of the FIDIC Red Book, Final Report’ [1996] Department of Construction Management & Engineering, University of Reading, England.

⁶ M Allen, ‘Construction disputes on the rise’ (2011) 27(6) CLJ 525-528.

responded that an impartial Engineer would not make a lot of sense as he was being paid by the Employer.⁷

As the debate is still ongoing, some commentators believe that the Engineer is pressured from both parties.⁸ The Contractor argues that the Engineer is being paid by the Employer and the Employer ultimately approves the Engineer's design. Further, the Engineer has a long standing relationship with the Employer and could be targeting future projects from the same Employer. Moreover, the Engineer is often obliged to consult with the Employer before making certain decisions.⁹ Finally, in many instances the root of the dispute lies in the Engineer's own work (for example, delay in supplying design documents, design ambiguities and errors etc). Hence particular emphasis is often made on the situations where the Engineer's own actions are at the core of the dispute, and the ability of the Engineer to be impartial in such disputes is widely questioned.¹⁰

The Employer argues that the Engineer is being too generous in the assessment of the Contractor's claims¹¹ and often grants an EOT's where it could have been avoided. On the other hand, there is often an established relationship between the Contractor and the Engineer that may have had previous experience of working together.¹²

Sir Michael Latham's report "Constructing the Team"¹³ also demonstrated that the alleged impartiality of the Engineer does not always reflect the reality and therefore the entire notion needs to be revisited. That is why, by way of example, the ICE form of contract previously used in the UK specifically divided the role of the Engineer into four separate sub-roles, namely a project manager, a designer, a contract supervisor

⁷ N Bunni, *The FIDIC Forms of Contract, Third Edition* (Blackwell Publishing, 2005).

⁸ C Duthie, 'The Engineer – a balancing act'.

⁹ N Bunni, *The FIDIC Form of Contract, the fourth edition of the red book* (2nd edn Blackwell Science, 1997).

¹⁰ J Al-Dine Nassar, 'Claims, disputes and arbitration under the Red Book and the New Red Book (Part 1)' (2009) 25(6) CLJ 405-443. Also see N Bunni, *The FIDIC Form of Contract, the fourth edition of the red book* (2nd edn Blackwell Science, 1997).

¹¹ Bunni, above n 9.

¹² I Ndekugri, N Smith and W Hughes, 'The engineer under FIDIC's conditions of contract for construction' (2007) 25 Construction Management and Economics 791–799.

¹³ M Latham, *Constructing the Team, Final Report of the Government/Industry Review of Procurement and Contractual Arrangements in the UK Construction Industry* (HMSO, London 1994).

and an adjudicator.¹⁴ Amongst them all, only the adjudicator was not the agent of the Employer.

Altogether, it perhaps unsurprising that the topic of the Engineer's impartiality remains one of the most spoken of and much debated in the construction industry.¹⁵ However, the review of the literature demonstrates that although previously conducted studies have attempted to discuss the issues with the impartiality, this current study is nevertheless unique as there is a gap in the literature in a sense that there were no attempts to discuss this topic in the context of the UAE.

1.2 Research Problem

The FIDIC Red Book has long been criticised due to the much questioned role of the Engineer being the Employer's agent while having an obligation to act as an impartial and independent party in the determination of the disputes between the Employer and the Contractor. It is due to the amount of criticism (among others) that FIDIC had produced a new revision of the Red Book in 1999. While the FIDIC 1987 Red Book sub-clause 2.6 stipulates that "...Engineer to act impartially"¹⁶, the FIDIC Red Book 1999 sub-clause 3.1 stipulates that "...the Engineer shall be deemed to act for the Employer"¹⁷.

The Engineer's role was examined in-depth based on the commentaries on the FIDIC books and the relevant cases. The main differences between the books were identified as follows:

- 1) The Engineer's duty "to act impartially" was substituted by an obligation to make a "fair determination" on the matters such as, but not limited to, payments, claims and variations;
- 2) The Employer was given the permission to contractually limit the Engineer's authority through express provisions that list the authorities that the Engineer is not permitted to exercise unless approved by the Employer;

¹⁴ Engineering and Construction Contract, 1995.

¹⁵ C Seppala, 'Contractor's Claims under the FIDIC International Civil Engineering Contract' (1986) 14 IBL 179. Also see N Bunni, *The FIDIC Form of Contract, the fourth edition of the red book* (2nd edn Blackwell Science, 1997).

¹⁶ Conditions of Contract for Works of Civil Engineering Construction 4th edn, 1987.

¹⁷ Conditions of Contract for Construction For Building and Engineering Works designed by the Employer 1st edn, 1999.

3) DAB was incorporated as a dispute resolution method.

Hence, although the dual role of the Engineer still remains to an extent, an option to contract where the Engineer acts as the Employer's agent was introduced.¹⁸ Thus, the attempts of parting away from the impartial role of the Engineer were somewhat apparent in the new revision of FIDIC Red Book 1999¹⁹, although a question would remain as to whether the Engineer's duty to act impartially was substituted by a duty to make "fair determination".

On the other hand, FIDIC 1999 introduced sub-clause 2.5 [Employer's Claims] under which the Employer is entitled to utilize the Engineer in preparing the claims against the Contractor. Hence, whilst sub-clause 2.5 stipulates that the Engineer is permitted to prepare such claims for the Employer, the sub-clause 3.5 [Determinations] states that the Engineer must exercise the authority to determine this very claim he had possibly prepared himself.²⁰ Hence, since the Engineer is often consulted by the Employer as to the merits of the Contractor's claims, the ability of the Engineer to make "fair determination" is widely questioned²¹ and many would opine that "...it is difficult ... for the Engineer to be seen acting impartially."²² It would seem that due to this conflict of interest, the traditional approach of the Engineer determining the Contractor's claims is compromised.²³

1.3 Research Questions

The study is sought to answer the below research questions:

1. How truly impartial the Engineer under the FIDIC Red Book in the context of UAE is?
2. Does the Engineer act in favour of the "Employer" who is his ultimate employer / principal?

¹⁸ Ndekugri, Smith and Hughes, above n 12.

¹⁹ Ibid.

²⁰ T P Kolonne, "Engineer" in FIDIC Red Book(s) <http://www.slqs-uae.org/slqs/Article33.pdf> accessed 17 March 2013.

²¹ C Lina, 'Role of the Engineer under FIDIC Form Contract' (1997) *Journal of Professional Issues in Engineering Education and Practice*, 123 (2).

²² Duthie, above n 8.

²³ J R Cheeks, 'Multistep Dispute Resolution in Design and Construction Industry' (2003) *Journal of Professional Issues in Engineering Education and Practice*, 129 (2).

3. Should the Engineer be perceived as ‘biased’, what are thus the proposed solutions?

1.4 Aim and Objectives

The aim of this study is to establish the users’ perceptions on the impartiality of the Engineer under the FIDIC Red Book in the UAE and to analyse the solutions they suggest in order to overcome this issue.

The above aim is also in line with other objectives such as establishing the facts (if any) that the Engineer under the FIDIC Red Book in the UAE is not seen impartial; establishing the reasons for the Engineer to be biased (if found to be so); establishing the consequences of the Engineer’s partiality (if any) on the projects and the parties’ contractual relationships; analysing the users’ proposed solutions and identifying the provisions that should have been included or amended in the FIDIC Red Book.

1.5 Research Methods

Although the study was intended to rely on the literature review, particularly on the FIDIC commentary and relevant articles, as well as on the available case law, the following research limitations were noted:

1. The literature available on this subject is exceptionally limited, particularly the literature that focuses on the UAE construction industry. No sufficient data is available on the aspect of the Engineer’s impartiality in the UAE.
2. The majority of available sources are outdated (published in the 1980-s and the 1990-s).
3. No relevant case law is published in the UAE. The case law from other jurisdictions is mentioned in passing wherever relevant.

Having noted the above research limitations, the study largely relied on the fieldwork. Over two months were allotted to visit the representatives of the commercial and contracts departments of the major development and major contracting companies in the UAE, where the respondents were interviewed based on the list of questions derived from the review of the literature. The interviewees were selected based on their professional qualifications and work experience, within the professional network of the well known construction companies in the UAE.

Further limitations relate to the unavailability of the interviewees as well as their unwillingness to explicitly discuss the subject of the Engineer's impartiality. It would appear that it is due to the latter that very poor cooperation was received from the Employers' (developers) representatives.

1.6 Significance of Research

The research aims for in-depth analysis of the current perception of the impartiality of the Engineer by the users of FIDIC Red Book in the UAE, namely the Employers and the Contractors. The analysis aims at the key provisions of the FIDIC Red Book and their factual effect on the industry as opposed to perceived objectives envisaged by the drafters. It is hoped that the FIDIC drafters may consider the findings of this study in order to further improve the efficiency of the key provisions in the FIDIC Red Book.

UAE construction industry is the key object of the study; however, other jurisdictions that are using a similar type of contract are considered and mentioned in passing wherever relevant.

1.7 Dissertation Outline

The dissertation consists of six chapters.

Chapter One – Introduction

This chapter provides an overall general overview of the dissertation research, its background, the research problem and the relevant research questions that this study intends to answer. Furthermore, this chapter discusses the aims and the objectives of the study. The chapter is concluded by the dissertation outline and the significance of the research.

Chapter Two – Impartiality of the Engineer under the FIDIC Red Book

This chapter provides critical analysis of the relevant FIDIC Red Book provisions. The difference in contract provisions between the 1987 and the 1999 edition of the Red Book are also examined in this chapter.

Further, this chapter analyzes the effect of the relevant contract clauses on the Engineer's conduct and its impartiality in particular. The analysis also covers the

FIDIC commentators' and experts' perception of the impartiality of the Engineer under the FIDIC Red Book.

Chapter Three – Research Methodology

This chapter describes the methods used for the data collection. Firstly, the list of questions was prepared and the respondents identified. Thereafter the respondents were approached in order to obtain their consent on participating in the research. Finally, upon obtaining their consent, the respondents were interviewed.

Chapter Four – Data Analysis

This chapter provides critical insights on the current situation in the local construction industry, particularly in perceiving the Engineer's impartiality by the users of the Red Book in the UAE (Employers and Contractors). This chapter also analyzes the contracting process, the dispute resolution process, as well as the parties' satisfaction with the Engineer's determination.

Chapter Five – Discussions

This chapter analyzes the possibility of further amendments to FIDIC Red Book and any other solutions that may be proposed to overcome current challenges that exist in the industry as a result of present application of FIDIC provisions.

Chapter Six – Conclusions and Recommendations

This chapter confines together all the outcomes of the research and presents the overall findings and recommendations for further research.

2. Impartiality of the Engineer under the FIDIC Red Book

2.1 Introduction

The Literature Review chapter provides critical analysis of the relevant FIDIC Red Book provisions. The difference in contract provisions between the 1987 and the 1999 edition of the Red Book will also be examined in this chapter.

Further, this chapter analyses the effect of the relevant contract clauses on the Engineer's conduct and its impartiality in particular. The analysis will also cover the FIDIC commentators' and experts' perception of the impartiality of the Engineer under the FIDIC Red Book.

2.2 A great debate

One would perhaps opine that the FIDIC form of contract is clear on its intent for the Engineer's role and that the FIDIC drafters foresaw that the Engineer would provide its services in a judge-like manner, being a person the contract parties can trust.²⁴ Further, at common law, the Engineer has an implied duty, and under the Code of Ethics of FIDIC²⁵ – an express duty - to act impartially in the application of contract between the Employer and the Contractor. It may sound straightforward in theory but not necessarily so in practice.

Redfern and Hunter in their book have expressed an opinion that it is due to the fact that the Engineer is appointed by the Employer he is viewed as lacking the required independence in making the decisions.²⁶ Several English cases²⁷ also suggest that the Engineer, being the Employer's agent, will ultimately act purely in the interest of the Employer and perhaps unfavourably to the Contractor.

Further, the Employer might terminate the Engineer's contract if dissatisfied with the services. The question would therefore arise as to the genuine possibility for the

²⁴ Bunni, above n 9.

²⁵ FIDIC Statutes and By-Laws, 1996.

²⁶ A Redfern, M H Hunter, N Blackaby and C Partasides, *Redfern And Hunter On International Arbitration* (5th edn, Oxford 2009) 39. Also see O Nisja, 'The Engineer in International Construction: Agent? Mediator? Adjudicator?' (2004) 21(2) ICLR 230.

²⁷ *Chambers v Goldhorpe* [1901] 1 KB 624, 634.

Engineer to act truly impartially. One would probably say that it would appear to be impossible; some would even call it a ‘naive’ expectation²⁸; however, it would perhaps be possible to act fairly.²⁹ Nevertheless, many may still argue that ‘...the engineer is paid to have a different role - namely, impartiality.’³⁰

2.3 The dual role of the Engineer

The dual role of the Engineer under the FIDIC form of contract is widely noted.

Seppala in several of his books³¹ addresses the Engineer’s dual role being the Employer’s agent as well as an impartial body (who is no longer required to act as the Employer’s agent) in deciding on contractor’s claims. However, and as perceived by various authors, there are some implications as to the agency’s role of the Engineer - it would appear that being an agent the Engineer should not be expected to act impartially as he must protect the Employer’s interests.³² They also do not believe in the very existence of the quasi-judicial role of the Engineer.

2.4 Red Book 1987 vs. Red Book 1999

Under the Red Book 1987 edition the Engineer has an obligation of the Employer’s agent in supervising the contract performance, while acting as an impartial party in performing other functions particularly while determining the claims. The argument however remains that ‘*acting impartially*’ might differ from the conventional role of ‘*acting independently*’.³³ It would also appear that being the Employer’s agent the Engineer would not simultaneously enjoy the independent functionality and is therefore purely a representation of the Employer. As such, the Engineer as an agent has no discretion due to the nature of the relationship that is governed by the law of agency.³⁴

²⁸ J Myers, ‘Finality of Decisions of Design Professionals where the Contract Provides the Decision will be Final’ (1985) 2 ICLR.

²⁹ Nisja, above n 26.

³⁰ M Mortimer-Hawkins, ‘FIDIC—An Engineer’s View of the Engineer’s Role’ (1984) 4 ICLR.

³¹ Seppala, above n 15.

³² M Rubino-Sammartano, ‘The Role of the Engineer – Myth and Reality’ (1986) IBL.

³³ J Sawyer and C A Gillott, *The FIDIC Digest: Contractual relationships, responsibilities and claims under the fourth edition of the FIDIC Conditions* (Thomas Telford, London 1990).

³⁴ *JF Finnegan Ltd v Ford Seller Morris Developments Ltd* [1991] 53 BLR 38.

Many commentators believe that an impartial Engineer was re-introduced again with the 1999 edition of the Red Book that expressly stipulates that the Engineer shall exercise “fair determination”³⁵ while deciding on all matters related to variations of cost, time etc. However, the meaning of the notion of “fair determination” was widely debated.³⁶ In *Semco Salvage Marine Pte Ltd v. Lancer Navigation Ltd*³⁷ it was held that “fair” would mean “fair to both parties”. It would therefore appear that the FIDIC drafters expected the Engineer to act fairly in carrying out his duties whilst also being an agent of the Employer.

Another controversial point lies in the sub-clause 3.5. This sub-clause indeed requires the Engineer to make a “fair determination”, according to the Contract, and taking into consideration all relevant circumstances; however, while the claims are to be referred to the sub-clause 3.5, the payments and variations are not.³⁸ Therefore the question to be asked is what should be the Engineer’s conduct where sub-clause 3.5 does not apply? Some authors express their concerns that although the Contractor might express his dissatisfaction with the “unfair” treatment, the Engineer would probably respond that he does not have to be fair in the cases where sub-clause 3.5 does not apply.³⁹ It was suggested that the solution to this would perhaps be an express general obligation to be fair, as opposed to being impartial, wherever any decisions are to be taken by the Engineer or the Employer.

It would appear to be clear however that the Engineer was indeed intended to be fair and impartial by the drafters, as he is accountable before the adjudication board which is independent and impartial by definition. Otherwise, there would be no point in having a dispute resolution procedure whose only aim is to correct every biased decision put before them.⁴⁰

³⁵ “Just as one begins to miss the impartial engineer, any typical professional service agreement states that the engineer is under a contractual duty to exercise a “fair determination”. See C Jayalath, ‘Demystifying the Role of Engineer under FIDIC Forms’ [http:// www .cm guide.org](http://www.cm.guide.org) accessed 17 March 2013.

³⁶ P Battrick and P Duggan, ‘The rainbow suite. The 1999 FIDIC suite part 1’ (2011) CES.

³⁷ *Semco Salvage Marine Pte Ltd v. Lancer Navigation Ltd* [1996] 1 Lloyd’s Rep. 449, 457, 459, CA.

³⁸ E Corbett, ‘FIDIC’s new rainbow 1st edition – An advance?’ (2000) 17(2) ICLR 253.

³⁹ Ibid.

⁴⁰ Nisja, above n 26.

However, certain arguments still remain plausible. According to Totterdill⁴¹, the only way to obtain a truly impartial decision is through the DAB, provided that it was appropriately constituted. His opinion is being further reinforced by the fact that Red Book 1999 edition defines the Engineer as the ‘‘Employer’s Personnel’’ hence the Engineer is practically being regarded as an ‘‘extension’’ of the Employer.⁴²

Nonetheless, many believe that the change in the new Red Book merely reflected what has always been a normal practice in the industry (i.e. the Engineer was always regarded as an agent of the Employer).⁴³ It is also not clear as to why the terminology had been changed from the ‘‘impartial’’ to ‘‘fair’’, unless it is being suggested that now the Engineer *may* in fact be biased. Does this change mean that the Engineer would make a different decision on a claim, and the influence of this change on the Engineer’s role will only develop with time? It would appear that if the Engineer was already acting fairly under the contract, then the amendment in the wording would perhaps be less significant.⁴⁴

On the other hand, it would appear that although the Engineer is no longer required to act impartially, it is sufficiently complemented by introducing the DAB.

2.5 ‘‘Issues’’ with the discretion

In respect to the requirement to act impartially sub-clause 2.6 of the Red Book 1987 refers to the circumstances ‘‘...wherever...the Engineer is required to exercise his discretion’’. Some authors opine that it had been wrongly implied that the Engineer does not have discretion while acting as an agent of the Employer.⁴⁵ And this is the reason for the limitations of the Engineer’s powers to be expressly stated in the contract – so as to specify in what circumstances the Engineer is to act as an agent rather than to exercise his discretion impartially.

⁴¹ B W Totterdill, *FIDIC User’s Guide: a Practical Guide to the 1999 Red Book* (Thomas Telford Ltd, London 2001).

⁴² Nisja, above n 26.

⁴³ *EIC Contractor’s Guide to the FIDIC Conditions of Contract for Construction* (European International Contractors, Berlin 2002).

⁴⁴ B W Totterdill, *FIDIC users’ guide: A practical guide to the 1999 Red and Yellow Books* (Thomas Telford Publishing, London 2006).

⁴⁵ Jayalath, above n 35.

It is however difficult to identify a situation where the Engineer's function does not involve discretion. Not all of the actions listed under the "independent role" are in fact fully disconnected from the Employer's agent role. Therefore, arguments may arise as to the application of sub-clause 2.6 provision. Should all of the Engineer's functions be subjected to the impartiality requirement, will the agent's role eventually vanish?

Some experts therefore suggested a solution similar to what was later adopted in ICE 6th edition, where the Engineer was obliged to act impartially in all matters apart from those that required Employer's specific approval and were expressly stated in the contract (i.e. those that were related to the Employer's agent role).⁴⁶ Some authors however suggested listing rather those functions where the Engineer is not obliged to act impartially (i.e. agency functions) instead of actions for which he should obtain the Employer's approval.

The Employer often limits the Engineer's authority through express contract provisions, particularly those related to the cost and time variations.⁴⁷ Moreover, many misinterpret FIDIC provisions and assume that the Employer enjoys the authority to delay or even reject the Contractor's entitlement for additional cost (see sub-clause 4.12), extension of time (see sub-clause 8.4) or the variations under the Clause 13 by merely not releasing "the specific approval" for the Engineer to proceed.⁴⁸

Such dichotomy that perhaps was not originally intended by the FIDIC drafters, had been exploited in the region to such extent that the government clients (for example, authorities in Abu Dhabi and Kuwait) expressly assign to themselves a sole discretion in instructing cost variations including those associated with risks that are not attributed neither to the Contractor nor the Employer.⁴⁹

The conditions of contract used by Dubai Municipality for the procurement of public sector projects heavily depart from the standard FIDIC conditions so that the Engineer is required to obtain the Employer's approval on all matters related to the programme,

⁴⁶ *Commentary on FIDIC 4th edition clauses* (ECC – London).

⁴⁷ Battrick and Duggan, above n 2.

⁴⁸ R Appuhn and E Eggink, 'The Contractor's View on the MDB Harmonised Version of the new Red Book' (2006) 23(1) ICLR 4.

⁴⁹ E Sunna and O Al Sadoon, 'FIDIC in the Middle East' (2007) 193 Law Update 20.

contractor's payments and the issuance of completion certificate.⁵⁰ However, in one of the cases⁵¹ the Dubai Court of Cassation held that the Employer is precluded from challenging the certificate or relieving himself from any liabilities arising out of such a certificate unless the Engineer was found to be engaged in the act of collusion or fraud with the Contractor.⁵²

Under the Red Book 1999 edition the Engineer is not obliged to make his determinations impartially unless it is expressly provided for in the conditions of the contract.⁵³ However this matter of impartiality does not arise where the Engineer's discretion is expressly limited by the contract conditions.

2.6 The requirement for consulting with both parties: the real outcome

There is an express provision under the FIDIC 1987 edition for the Engineer to consult with the parties. The Engineer is however permitted to dismiss the Employer's instruction (if any given); otherwise he will be liable of misconduct, at least under the English law. The doubts nonetheless remain whether the Engineer would perform his duties fully independently, although it is required in theory.⁵⁴

As the argument develops further, the question arises as to the impartiality of the Engineer's determination bearing in mind his discussions with both the Employer and the Contractor. The predicament here is that he might be influenced by such consultations and it might affect his own decision. It would therefore appear that the consultation meant to be a sign of impartiality however it does not guarantee it.

2.7 Engineer under JCT, ICE and NEC form of contract

As example, under JCT⁵⁵ and ICE⁵⁶ form of contract the contract administrator also performs a dual role: as an agent of the Employer as well as a third neutral party that has a duty to decide on certain matters not necessarily in the interest of the Employer.

⁵⁰ Ibid.

⁵¹ Dubai Court of Cassation decision in Action No. 167 on 06.06.98.

⁵² Abdallah, 'Employer's claim dismissed before Court of Cassation' (2010) 235 Law Update 9.

⁵³ *The FIDIC Contracts Guide* (1st edn, 2000).

⁵⁴ C Seppala, 'Contractor's claims under the FIDIC civil engineering contract, Fourth (1987) Edition' (1991) 8 IBLJ 1051-1086.

⁵⁵ Joint Contracts Tribunal 80 Standard Form and JCT Minor Works.

⁵⁶ Institution of Civil Engineers Measurement Version 5th edn.

Under other standard form of contract the contract administrator does not necessarily have such a dual role.⁵⁷

In an interesting *Bechtel* case⁵⁸ the impartiality of the project manager on the project was questioned, particularly whether he was to act in the interest of the Employer or impartially while assessing the payments. The circumstances of the case were such that the Bechtel representative was found to be biased towards the Employer. The defendant nonetheless argued that he was not required to act impartially under the contract.

By way of comparison, in *Sutcliffe v Thackrah*⁵⁹ it was held that while issuing the payment certificates, an architect is still liable in negligence towards his Employer. He nonetheless must act fairly towards the Contractor while judging on certain matters.

In the *Bechtel* case, however, the uncertainty was related to a duty of the project manager that supposedly was being employed to specifically support the interests of the Employer. The Judge held that the project manager was required to act impartially while certifying the payments. The question nonetheless remained whether such impartial decisions of the project manager would be rightly challenged by the Employer as the project manager must have acted in the interest of the Employer in all matters, including certification of payments.

In *Scheldebouw BV v St James Homes (Grosvenor Dock) Ltd*⁶⁰ it was also held that the construction manager had had a dual role similar to the one of the Engineer: i.e. acting as an agent of the Employer while acting impartially on certain other matters.

By way of example, in NEC3/ ECC form of contract the project manager's decision could be challenged before the adjudication tribunal. This generally would protect the Contractor from the possibility of the project manager's unfairness.⁶¹

Looking at the ICE Conditions of Contract⁶², the Engineer here has a dual capacity as well, and must act impartially in judging on certain matters. JCT form of contract

⁵⁷ C O'Carroll and N Jones, 'The independence and impartiality of contract administrators under various standard forms of construction contracts' (2007) 23(7) CLJ 475-504.

⁵⁸ *Costain Ltd v Bechtel Ltd* [2005] EWHC 1018 (TCC); [2005] T.C.L.R. 6 (QBD (TCC)).

⁵⁹ *Sutcliffe v Thackrah* [1974] A.C. 727.

⁶⁰ *Scheldebouw BV v St James Homes (Grosvenor Dock) Ltd* [2006] EWHC 89 (TCC); [2006] B.L.R. 113.

⁶¹ O'Carroll and Jones, above n 57.

does not have an express provision as to the impartiality; however it is an implied obligation.⁶³

2.8 Conclusion

This chapter provided critical analysis of the relevant FIDIC Red Book provisions, such as, but not limited to, sub-clause 2.6 of the FIDIC Red Book 1987 edition and sub-clauses 2.5, 3.1 and 3.5 of the FIDIC Red Book 1999 edition.

The difference in the above contract provisions were also examined in this chapter. The Engineer's duty "to act impartially" was substituted by an obligation to make a "fair determination" on the matters such as, but not limited to, payments, claims and variations; the Employer was given the permission to contractually limit the Engineer's authority through express provisions that listed the Engineer's authorities that he is not permitted to exercise unless approved by the Employer; and the DAB was incorporated as a dispute resolution method.

Further, this chapter analyzed the effect of the relevant contract clauses on the Engineer's conduct and its impartiality in particular. The analysis also covered several court cases as well as the FIDIC commentators' and experts' perception of the impartiality of the Engineer under the FIDIC Red Book; and it would appear that there are issues with the notion of the "impartial Engineer" under the FIDIC Red Book. Further, dissatisfaction with the standard FIDIC dispute resolution procedure (Engineer – Arbitration) has been noted prior to the release of the Red Book 1999 edition.⁶⁴

And there would appear to be reasons for that, first and foremost being the Engineer's partiality. The main reason for it was found to be the contractual relationships between the parties namely the Employer, the Engineer and the Contractor. Another reason would appear to be the nature of the disputes as many of them were arising as a result of the Engineer's decisions and instructions. Further, the Engineer's authority is often

⁶² ICE Conditions of Contract Measurement Version (7th edn, 1999) (including amendment to clause 66, 2004).

⁶³ O'Carroll and Jones, above n 57.

⁶⁴ R Shorland, 'Role of the engineer and settlement of disputes under FIDIC conditions of contract for works of civil engineering construction' (1999) 65(2) Arbitration 92-101.

expressly limited by the Employer, hence the Engineer can no longer act impartially, not at least where he is required to exercise *“his discretion”*.

The next step would be to analyze the data collected on the subject of the Engineer’s impartiality from the FIDIC Red Book users in the local construction industry. Hence, the next Chapter (Chapter Three) will describe the methods used for the data collection following by Chapter Four that will provide the analysis of the data.

3. Research Methodology

Although both quantitative and qualitative researches use experimental methods, they, however, differ. Quantitative research is sought to test a certain hypotheses, while qualitative research often attempts to answer a particular question(s). Qualitative research examines the processes, studies the records and interviews the people engaged in these processes. In our case, no particular hypothesis was identified prior to commencing the research; however the list of research questions was prepared. As the main aim of this research is to establish the actual perception on the impartiality of the Engineer by the FIDIC Red Book users and the practitioners in the local industry, the qualitative and socio-legal research was adopted in lieu of quantitative research.

The first step was to prepare the list of questions. The list consisted of total of 23 questions that were derived from the research questions, the personal knowledge about the research subject, and the literature review. The questions were framed in headings and subheadings, and organised from general to specific, starting from the questions about the years of experience, qualifications, job position of the respondent etc.

The second step was to identify the respondents. The respondents were identified from the personal contacts. The main selection criteria were the participants' professional and academic background (refer to Chart 1 below) and the extent of the experience in the local construction industry (refer to Chart 2 and Chart 3 below).

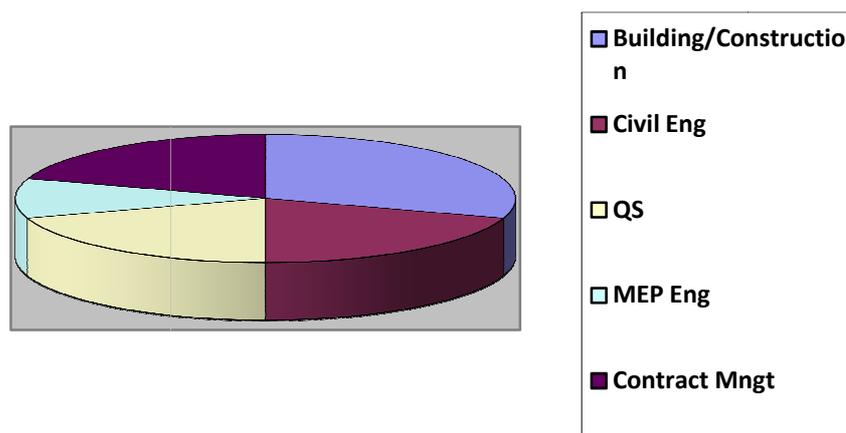


Chart 1 – Main Professional Background of the Respondents

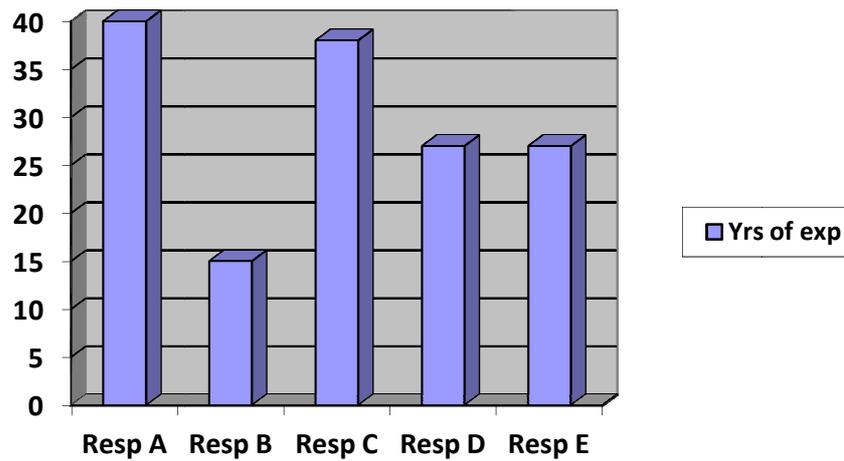


Chart 2 – Years of experience in the Construction Industry (Contractors)

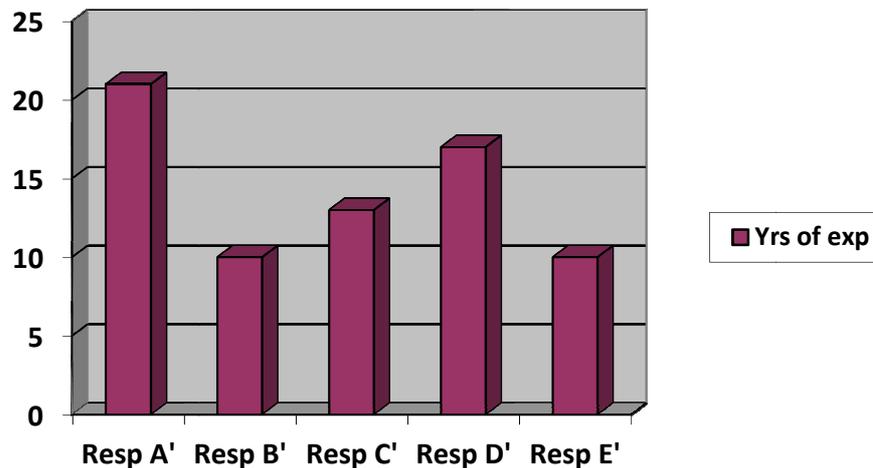


Chart 3 – Years of experience in the Construction Industry (Developers)

The scale of the construction enterprise/ development organization the participants are employed by and the current position in the organization also played a major role in the selection process.

An attempt was made to utilize the “snowballing technique” (requesting the interviewee to recommend another interviewee that might be willing to participate in the research), however, it proved to be unsuccessful due to low number of references provided by the participants.

The third step was to approach the respondents and to obtain their consent on participating in the research. The respondents were approached either via introductory

email, or through a phone call, depending on the level of the established relationship. The email stated the research thesis, the aim and the objectives of the research, and the questions the research sought to answer. It also stated the time required for the interview, the recording arrangements (it was optional, and only upon receiving the interviewee's permission), and the confidentiality statement.

The intention was to interview five representatives of the contracting companies and five representatives of the development companies. The representatives of the contracting companies were willing to participate and contribute to the research. Total of eight representatives of the contracting companies have confirmed their participation, however, only five were interviewed in order to keep the balance between the contractors and the developers. The representatives of the development companies have not expressed any interest in the research; moreover, when asked about the reason for declining the participation, one of the directors of one of the biggest development companies in the UAE had expressed his personal negative opinion on the FIDIC form of contract. Generally, there were issues with obtaining the consent to participate from the representatives of the development companies. Due to this reason, the data collection stage of the research was prolonged for two months from its original duration.

Upon receiving a confirmation on the willingness to participate in the research, a list of questions was issued to the interviewees.

The fourth step was to meet and interview the respondents. The majority of the interviewees were not willing to be recorded; hence comprehensive notes were had to be taken during the interview. Some of the interviews lasted for a minimum of 30 minutes; however some lasted for 1.5 to 2 hours – as additional questions were allowed to be asked throughout the interview to open up an enhanced discussion. Several respondents were not willing to meet due to the busy schedules and various other commitments. In such instances, the responses were received via email and evaluated accordingly.

4. Data Analysis

This chapter provides critical insights on the current situation in the local construction industry, particularly in perceiving the Engineer's impartiality by the users of the Red Book in the UAE (the Employers and the Contractors). This chapter also analyzes the contracting process, the dispute resolution process, as well as the parties' satisfaction with the Engineer's determination.

Throughout this chapter, citations shall be used in accordance with the coding system as proposed in the Table 1 below:

Table 1 – Coding System

No	Respondent	Code
1	Contracting Company A	A
2	Contracting Company B	B
3	Contracting Company C	C
4	Contracting Company D	D
5	Contracting Company E	E
6	Developer A	A'
7	Developer B	B'
8	Developer C	C'
9	Developer D	D'
10	Developer E	E'

4.1 General overview of the use of FIDIC contract form in the UAE

4.1.1 Findings based on the interviews with the Contractors

All of the respondents from the contracting companies stated that although both 1987 and 1999 edition of the FIDIC Red Book are adopted, the shift in the recent years was towards 1999 edition. That being said, although existing contracts are based predominantly on 1987 edition, two out of three new contracts in the UAE in the past three years are based on 1999 edition. Respondent D and Respondent B have noted that other forms of contract are occasionally being used (as at least two of the major developers in the UAE are imposing their own standard contract); however FIDIC form is predominantly adopted in the UAE construction industry.

That being said, as advised by the contractors participated in the research, the contract is normally greatly modified by the Employer or the Engineer. A general feedback was that the modifications are being imposed by the Employer. Clauses relevant to the Engineer's authority are heavily modified (such as sub-clause 2.1) and, as commented by the Respondent C, "all Engineer's powers are taken away".

Clauses modified in 1999 edition are: clause 2, 3, 8, 10, 11, 20 (other clauses are modified as well but those listed herein represent a major contractual impact). Clauses modified in 1987 edition are: sub-clauses 2.1, 5.2, 14.1, 20.4, 44.1 (clause 44.1 (e) is usually deleted), 47.1, 51.1, 52.3, 56, 60.10, 67.3, 69.1, 70.1, 70.2, 71, and 72. Further, periods of time are often reduced for the notifications (such as in sub-clauses 10.1, 48.1, 53.1, 53.3, 60.5, 60.6, 60.10 and 67.1) and increased from 28 days to longer period for payments.

Respondent D stated that the sub-clause 2.6 ("Engineer to Act Impartially") is normally deleted by the Employers from the contracts that are based on the 1987 edition. And although the Contractor would formally request for this clause to be kept in the contract, it has never been accommodated in any of their UAE contracts. They have also proposed for this sub-clause to be included in the contracts based on the 1999 edition, but only succeeded in this request in the Kingdom of Saudi Arabia.

4.1.2 Findings based on the interviews with the Developers

Out of five interviewed representatives of the development companies only Respondent A' had confirmed using both 1987 and the 1999 Red Book; the Respondents B', C' and E' were using only 1987 edition and the Respondent D' – a bespoke form of contract adopted from FIDIC. Respondent B' had also confirmed occasionally using FIDIC Green Book; while Respondent A' confirmed that an attempt to use an Australian form of contract had been made however it proved to be unsuccessful.

All five respondents confirmed using modified version of the Red Book; however, Respondents B' and C' have confirmed modifying only Part 2 (Particular Conditions) while Part 1 remained unchanged. As commented the Respondent D', generally the contract clauses are "amended to suit the specific requirements of a project". General conditions are being developed "bearing in mind the company's business strategy at any given point of time".

With respect to the modifications to the 1987 edition, the following details were given:

Table 2 – List of Clauses modified in the FIDIC Red Book 1987 edn

No	Clause in FIDIC Red Book 1987 edn	Comments
1	Sub-clause 1.1 (Definitions)	The Employer can replace the Engineer at its own discretion.
2	Sub-clause 2.5 (Instructions in Writing)	Should the Engineer's Instruction constitute to a variation, it will be redrafted.
3	Sub-clause 5.2 (Priority of Contract Documents)	In the case of discrepancy in the documents the Engineer shall clarify the intent.
4	Sub-clause 22.1 (Damage to Persons and Property)	The Engineer is insured by the Contractor under its insurance.
5	Sub-clause 26.1 (Compliance with Statues, Regulations)	The Engineer shall be responsible for liaison with the appropriate authority.
6	Sub-clause 40.3 (Suspension lasting more than 84 Days)	Changed to Suspension Lasting more than 186 days.
7	Sub-clause 45.1 (Restriction on Working Hours)	The cost of over time to be paid by the Contractor.
8	Sub-clause 46.1 (Rate of Progress)	Any part of the Contractor's scope can be taken out and allocated to another contractor to complete. The reduction in the Contract Price, as amended pursuant to the Contract, shall be decided by the Engineer.
9	Sub-clause 48.1 (Taking-Over Certificate)	The Contractor shall furnish the Engineer for his approval with Operating & maintenance instructions and details together with a full set of drawings in sufficient detail to maintain, dismantle, and re-assemble all parts of the works.
10	Sub-clause 52.3 (Variations Exceeding 15 percent)	This sub-clause is deleted in its entirety.
11	Clause 60 (Certificates and Payment)	Time for certification and time for payment are modified.
12	Sub-clause 65.9 (Termination for Convenience)	A recently introduced clause that favours the Employer. (Alternatively, added under the Clause 63 – Remedies)

13	Sub-clause 67.1 (Engineer's Decision)	The Engineer is precluded from giving any decision without consulting the Employer (the Engineer is to act according to the Employer's decision).
14	Sub-clause 67.3 (Arbitration)	Arbitration rules are modified.

With respect to the modifications to the 1999 edition, the following details were given:

Table 3 – List of Clauses modified in the FIDIC Red Book 1999 edn

No	Clause in FIDIC Red Book 1999 edn	Comments
1	Sub-clause 3.1 (Engineer's Duties and Authority)	Heavily modified, the Engineer is to obtain prior written Employer's approval on certain matters.
2	Sub-clause 8.8 (Suspension of Work)	Modified.
3	Clause 10 (Employer's Taking Over)	Modified.
4	Sub-clause 11.9 (Performance Certificate)	Modified.
5	Clause 15 (Termination by Employer)	Modified.
6	Clause 13 (Variations and Adjustments)	Related to cost and/ or programme.
7	Sub-clause 14.3 (Application for Interim Payment Certificates)	Related to 'certain matters'.

Hence, in terms of the Engineer's duties he has no authority without the Employer's approval.

4.2 Contract Disputes and the Engineer: impartiality – a myth or a reality?

4.2.1 Findings based on the interviews with the Contractors

With respect to the question whether the contractors considered the Engineer an impartial party in their projects, four out of five participants (except for the Respondent B) responded that the Engineer was "never impartial" or "not impartial

in most of the projects”, or was “rarely impartial”. Only Respondent B stated that although generally the Engineer was impartial in his projects, however, the Employer “always has its say”. Furthermore, he commented that 1999 edition stipulates the Engineer as the agent of the Employer; hence the Engineer is “not impartial by default”. In his opinion, the impartiality is more relevant to 1987 edition, where the Engineer is impartial, but “only to a certain extent”. The respondent further opined that the Engineer can only be impartial “when the clause 67 applies”, i.e. when the Contractor formally requests for the Engineer’s decision, and in such instances the Engineer is contractually obliged to be impartial or “at least more impartial”. However, the Engineer is still influenced by the Employer. On a general note, impartiality was “not an issue” for this respondent and they have not had many instances where the Engineer’s decision was formally requested under the clause 67. He further stated that although they surely have had issues with the impartiality and fairness, and the Engineer was being “unfair” at times, however, not to the extent that the dispute was taken to arbitration or adjudication as they could always reach out to the Employer and resolve the issue. On a general note, he stated, they have very good relationships with all of their clients; furthermore, most of their clients are private developers, and not the government bodies. And although sometimes the Employers are “unreasonable” he would not intend to say that them being the contractor are badly treated.

Respondent D stated that he had not experienced the notion of impartiality in the UAE; further, “even in the UK the Engineer is rarely impartial”.

Speaking of the contractors’ satisfaction with the Engineer’s decisions under the contract, Respondent D noted that although the majority of their projects have claims, they are mainly settled amicably. This respondent was satisfied with seventy percent of the claims, with the remaining thirty percent still being in the process.

Respondent A was satisfied with only fifteen percent of the claims which he believed were determined “in a reasonable manner”. In his opinion, the challenge is that although an impartial Engineer’s determination may have been made it however may require an approval by the Employer who often rejects it. Such situation often occurs due to the delegation of power embedded in the contract. Further, the Engineer is paid

by the Employer and “doesn’t want to upset him”. In other cases, the design is at fault and the Engineer determines the claim in a certain manner in order to protect himself.

Respondent E stated that there was “no single claim” determined by the Engineer that he was satisfied with. He was of the opinion that irrespective of the circumstances, the Engineer would always initially reject the claim in an attempt to get it “time barred” under the contract. Under such circumstances, the Contractor would have no other option but to approach the Employer, hence the decision would effectively be the Employer’s decision. Further, he was of the opinion that although FIDIC 1987 edition assumes an impartial Engineer as opposed to FIDIC 1999 edition where the Engineer is an agent, the Engineer is “never impartial in reality” as he is paid by the Employer.

Respondent C was not satisfied with any of the claims. He stated that the impartiality was “an impossibility” as the Employer’s approvals still have to be made.

Respondent B was satisfied with only ten percent of the claims.

Please refer to the Chart 4 below that demonstrates the respondents’ level of satisfaction with the claims’ determination by the Engineer:

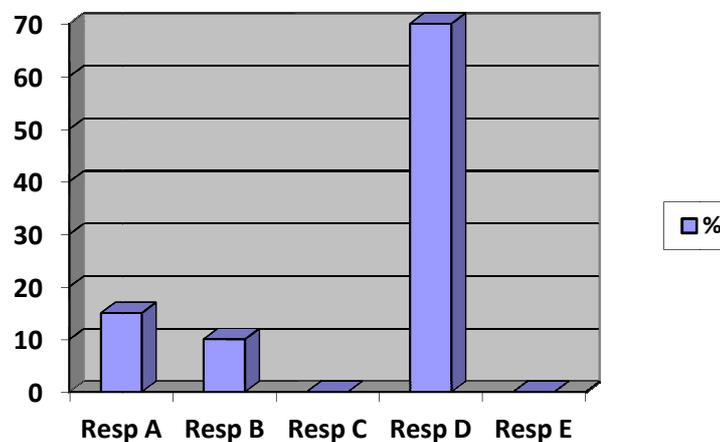


Chart 4 – Contractors’ Level of Satisfaction with the Engineer’s determination

When asked about the number of the disputes that eventually resorted to litigation/ arbitration/ other ADR, and whether the decision obtained at the end of the process was the same as determined by the Engineer under the contract, there were very distinct answers.

Respondent C stated that one of his projects is currently in Arbitration. The Project Manager and de-facto Engineer on the project apparently had had their own incentives if the works were completed on time and were penalised if the works were delayed. Hence no true impartiality could have ever been observed on the project. Works were delayed for 568 days due to the Employer's changes (added lifts, escalators, finishes changed); however, the approval on EOT was only received one month prior to the project completion. Further, although the delays were attributed to the Employer, the damages for the late completion were "billed" to the Contractor. According to the respondent, although the arbitration is currently in the process, the findings of the arbitration and the experts thus far suggest that the award is expected to be different from the earlier determination by the Engineer.

The respondent further commented that he shortly expects two of his other contracts to go to dispute - one of them pursuant to an EOT claim which he believes they are entitled for. The relationship with the Engineer on this project is well established. The other contract is for a very powerful and influential Client and all the parties involved in the project feel threatened. Hence it would appear to be "impossible to go to arbitration". Naturally, he stated, the Engineer on this project is "extremely biased" towards the Employer.

Respondent E presently has two ongoing cases: one is already in arbitration and another one is currently proceeding towards arbitration, yet an attempt to settle amicably on a senior level is still being made. The Engineer has allegedly informed the Contractor that he is "not in a position to intervene" as he receives the instructions directly from the Employer.

Respondent A opined that it is a normal practice in the UAE to settle disputes amicably on a senior level. This respondent has several disputes at the moment; however, for the majority of them the Engineer was not required to make a determination. One of the projects is currently in litigation as the works were completed but the Contractor was not paid. The litigation was assumed to be quicker. In several of his other projects the amendments to the contract were agreed on with the Employer during the contract performance. However the Employers did not pay the final settlements in full, leaving the Contractor with outstanding amounts of money on

majority of these projects. Hence, he commented, it is expected that in due course some of these projects will proceed to some form of dispute resolution as well.

Respondents B and D have not experienced any disputes with the clients that resorted to litigation/ arbitration/ another ADR. Respondent D currently has two ongoing disputes where an alternative dispute resolution method (similar to adjudication) has been agreed on with the client.

Going further, the respondents were asked about their opinion on the reasons for the initial Engineer's determination to be significantly different (if applicable); if they have eventually won the case. Respondent C commented that the Engineer was "simply not permitted to decide on the case properly", as he was being instructed by the Employer.

Respondent A has made a general comment that "unfortunately not all the consultants realise the importance of a correct initial assessment". Hence it often happens that the reputation of an engineering firm is eventually damaged.

The next question that was asked is whether there were any disputes related to the Engineer's own conduct.

Respondent B stated that there were "just occasional arguments and no formal disputes".

Respondent A expressed his concerns over one of his ongoing projects due to the lengthy process of obtaining the Engineer's responses to the Contractor. As FIDIC is vague on this matter and only stipulates a "reasonable time", the disputes related to it often occur. Further reasons he mentioned are listed within Table 4 below. He also added that ambiguities often resulting from the Employer's pressure on the Engineer to release the design for tender. Hence it is "not entirely the Engineer's fault".

Explaining further, he commented that it had become a custom in the UAE that the provisional sum items (nominated sub-packages such as interior design or MEP works) are of a particularly large value. Usually they are not fully designed at the time of the main contract award. Hence incomplete design brings about many negative consequences for the main contractor as there will inevitably be additional design work later that would also constitute to additional time. He shared his view that

previously it was a normal practice in the industry where such issues were being sorted out between the Contractor and the Engineer; however, presently all the additional design work is being ‘‘pushed’’ onto the main contractor.

With respect to delays in issuing approvals he commented that the delays often occur due to the pending Employer’s approval who is in turn awaiting his cost consultant feedback. Hence it is not ‘‘always entirely the Engineer’s fault’’.

Another issue is the determination of the value of work under clause 52. The determination is often a lengthy process, and the Engineer should provide provisional rates until such final rate is determined. However it does not happen in reality as FIDIC is vague on this matter.

Respondent D affirmed that there were ‘‘many such disputes’’, mostly due to the Engineer’s ‘‘inability to make the right decisions’’. Other reasons he mentioned are listed within Table 4 below.

Table 4 – Nature of disputes related to the Engineer’ own conduct

No	Respondent	Nature of dispute
1	Respondent A	Quality and functionality of the design; project buildability; accuracy of drawings, specifications and BOQ (BOQ often has missing items – intentionally trimmed down quantities in an attempt to reduce the tender price); design ambiguities, miscoordinated or/ and missing elements; contradiction between plans and specifications; late supply of design information/ drawings etc; delay in issuing instructions / approvals / certificates; Engineer’s instructions; determining variations; exceeding the powers granted by the Employer; disruption of progress; failure to consult with the parties on EOT and other matters; failure to adequately carry out the supervisory role (example of defective piling work was given); failure to carry out adequate budget control; incorrect contract interpretation (deleted words/ clauses/ paragraphs); determining value of work (key problem).

2	Respondent B	n/a
3	Respondent C	Although he has “not experienced any but potentially there could have been such disputes as the Engineer is always exposed to those”. “There could be numerous reasons resulting mainly from the Employer’s requirements.”
4	Respondent D	Quality and functionality of the design (Contractor often undertakes additional design work that supposed to be completed by the Engineer as part of the detailed design package); project buildability (the Engineer’s design is often not buildable, and when the Contractor proposes an alternative, it eventually becomes a claim (as it is an additional design work), that will ultimately transform into dispute); accuracy of drawings, specifications and BOQ; design ambiguities, contradiction between plans and specifications; late supply of design information/ drawings (particularly on fast track projects); delay in issuing instructions / approvals / certificates (particularly on fast track projects); Engineer’s instructions; determining value of work; determining variations; disruption of progress; failure to adequately carry out the supervisory role (insufficient staff); incorrect contract interpretation.
5	Respondent E	Accuracy of the drawings, specifications and BOQ; design ambiguities, contradiction between plans and specifications; delay in issuing instructions / approvals / certificates; Engineer’s instructions; determining value of work; disruption of progress; incorrect contract interpretation; late supply of design information/ drawings (major reason).

Next the respondents were asked whether the Engineer had acted impartially in such disputes in terms of his determination under the contract. Respondents A and E responded negatively while Respondent D commented that in such instances the Engineer would normally “agree on the obvious issues” however will still attempt to

shift the responsibility for the remaining errors to the Contractor. The Contractor would then generally negotiate however the Employer would normally get involved and eventually make a decision.

4.2.2 Findings based on the interviews with the Developers

When asked whether they would agree that the Engineer was impartial in their projects, distinct answers were received from the respondents. Respondents A' and E' stated that the Engineer was "usually impartial", at least "in majority of their projects". Respondent D' opined that the Engineer was "predominantly not impartial", and the Respondent C' stated that the Engineer is "never impartial", as he is still an "agent of the Employer". Respondent B' opined that the Engineer acts purely as a "post man", where the Employer's Contracts & Claims department would finalise the claim and simply request the Engineer to officially issue the decision to the Contractor. Normally various Employer's representatives would be administering the project as part of QS & Contracts Department, working along with the Engineer who "merely supervises the site". Hence, the Engineer can never act impartially as should he do so, he will not acquire repetitive business and will lose the clientele. The respondent further commented that after 12 years (1987-1999) even the FIDIC drafters realised the issue with the impartiality.

Next the respondents were asked about the percentage of claims determined by the Engineer under the contract they were satisfied with. Respondent A' noted that there are different categories of claims: there are variations to the contract majority of which arise from the provisional sum and prime cost items, such as, for example, MEP or interior finishes. Another category is the design changes from the Employer, where the Contractor would claim for additional work. And then there are the engineering issues for which the Contractor would claim additional cost as well. The latter may also arise out of the design changes requested by the authorities. Finally, there are also the Engineer's errors and those are the most complicated ones due to the conflict of interest. The contract would get varied and it will usually become a serious dispute on the identification of a party that "gets to pay" for the variation.

Then there are extension of time claims where the main challenge is to determine the cause of delay as there are usually concurrent delays involved. It is normally determined by the Engineer through a delay analysis. Generally, there are claims and

counter-claims; however, the respondent admitted that in his projects there is a tendency to deal with the claims “pragmatically, in order to keep the projects going”. He suggested being flexible on the contract administration, and “having some contingency allotted”.

He further commented that 1987 edition is “more balanced”, the role of the Engineer is “more impartial”, or at least it provides the Engineer with the ability to impart, whereas 1999 edition stipulates the Engineer as the agent of the Employer. And while the Engineer communicates to both parties independently, the relationship with the Employer commences much earlier than the one with the Contractor (usually 6 to 9 months earlier while the project is being designed). Hence the Contractor is “regarded as somewhat new party to the whole process” and it promotes the impression that the Contractor is not an equal party.

Speaking of the level of satisfaction with the claims, only Respondent E’ was “mostly satisfied” (with over seventy five percent of claims).

Answering the question about the number of the disputes that eventually resorted in arbitration/ litigation / other ADR, Respondent A’ answered “none as we always try to settle amicably”, while Respondent B’ confirmed that ninety percent of their project disputes are being taken to arbitration and further to litigation. Respondent D’ stated that majority of the disputes are resolved between the parties “by way of negotiations” and very few have resorted to litigation / arbitration. These are still in the process hence it is “premature to say how different the decision would be”.

Respondents E’ and B’ had the experience of both losing and winning the case. Respondent B’ had approximately fifty percent of disputes decided against and fifty percent - in their favour. Respondent E’ commented that although he is not closely involved in the dispute resolution process, “usually the final verdict is similar (if not exactly the same)” to the Engineer’s determination. However, he commented, there are cases where the final outcome was significantly different from the Engineer’s determination.

Respondent C’ stated that the decision they obtained was significantly different from the Engineer’s determination and although they have lost the case, he would consider the award “reasonable”.

The respondents were then asked what was in their opinion the reason for the initial Engineer's determination to be significantly different, if they eventually won the case. Respondent B' admitted that they "always force" the Engineer to act in the Employer's favour and hence there is "no independent decision by the Engineer". Respondents C' and E' stated that it was due to the fact that the Engineer was being biased, or in some instances merely "due to the lack of his professional conduct/ knowledge" and/ or out of a negligent contract administration.

Answering the question whether there were any disputes related to the Engineer's own conduct, all five respondents have affirmed. Amongst the nature of the dispute the following were stated: project buildability; accuracy of drawings, specifications and BOQ; design ambiguities, contradiction between plans and specifications; late supply of design information/ drawings etc; delay in issuing instructions / approvals / certificates; Engineer's instructions; determining value of work; determining variations; exceeding powers granted by the Employer; disruption of progress (delays); failure to adequately carry out the supervisory role; failure to carry out adequate budget control (majority of the Engineers do not recognise that they do have this responsibility, and although FIDIC provides for it, they believe there should be a separate QS firm appointed for this role); failure to consult with the parties; contract interpretation (when the Engineer has to make a determination, it is based on the interpretation of a contract often represented by poor drafting); and the quality and functionality of the design being the major reason.

Next the respondents were asked how such disputes were handled in terms of the Engineer's determination under the contract, and whether the Engineer in such instances had acted as a completely independent and impartial body. Respondent A' stated that a right to remain silent exists in civil law, and in order to avoid self-incrimination, the Engineer "often does exactly that". Thus, the Engineer would often avoid making certain determination if it may lead to exposing himself; when, for example, the design is at fault. He further commented that the international consultancy firms operating in the UAE would usually act impartially, however the local consultancy firms would "not bite the hand that feeds them as they will be out of the project and probably the market too".

Respondent B' stated that the Engineer is "never impartial" acting on the Employer's behalf. Respondent C' opined that the Engineer would always have "his own story" and attempt to find any errors or faults in the Contractor's performance in order to defend himself.

Respondent D' stated that the Engineer was "not completely independent and impartial".

Respondent E' affirmed that in the majority of cases the Engineer had acted impartially.

4.3 Impartiality and the lack of it: Reasons, Examples and Consequences

4.3.1 Findings based on the interviews with the Contractors

Amongst the reasons for the lack of impartiality, the following were stated by the respondents: the Employer exerts excessive influence; the Engineer is empowered by the Employer; the Engineer is paid by the Employer and seeks future work from the same Employer. There could be a number of concurrent or consecutive projects with the same Employer and the Engineer fears to lose the relationship. Hence, the Engineer protects his own interests.

Further, the Engineer often fails to provide proper design and attempts to shift the responsibility to the Contractor. The Employer does not realise it or is not aware of it until perhaps much later – often not until the construction had begun. There would also appear to be a general lack of understanding of the Engineer's role who has a duty to be impartial but does not realize it.

Furthermore, it is preferable for the Engineer to be "sided" with the Employer as it is relatively rare that the Contractor would offer work to the consultant – comparing to the amount of work from the Employers who are the Engineer's main clients.

Amongst the reasons for bias the following were also mentioned: provisional sum items under the main contract are problematic packages – usually numerous parties are involved, their capabilities are questioned and they are difficult to manage; changes mid-contract; and the deletion of clause 44.1 (e) that specifies any other causes of delay that are not attributed to the Contractor.

Speaking of the examples of biased Engineer's conduct, the following were given: circumstances where the Engineer would send notices of delay already knowing that the Contractor physically will not be able to comply with the time given for correction.

Respondent E shared his experience of an arbitration where the dispute was "manufactured" by the Engineer and used as a basis to call the performance bond.

Another example is the design errors cases. Normally there should be an RFI process where the Contractor would check the design and coordinate it. However he should not be held responsible for the incorrect design. In reality, however, the Engineer often attempts to shift the responsibility to the Contractor. Respondent D given an example of a project where the columns were designed incorrectly and the demolition (hence additional cost) was had to be involved. The respondent further emphasized that under the UAE Civil code the Engineer has a duty to design correctly.

Respondent A provided the following examples: faulty enabling work on site under the Engineer's supervision, design coordination, incomplete design, unbuildable design work, wrong material specifications, reduced bulk measurements in the BOQ in order to decrease the tender price; compelling the Contractor to proceed with the variations in the absence of a formal approval or agreed price; late approvals; contract misinterpretation - missing or irrelevant words, amended standard form where clauses are not properly interlinked etc.

Respondent E had given an example of one of the largest projects in the UAE where the Employer and the Engineer kept relationship so private that the Contractor was not aware of the issues that the Employer had had on the project and thus could not correct or defend himself. The Contractor was not permitted to attend the meetings.

Finally, the respondents were asked whether the Engineer's bias had affected their contract(s)/ project(s) and what consequences they have faced. The following were mentioned: cash flow issues – enormous losses that cannot be recovered (no variations are usually paid until they are fully agreed on); additional costs incurred (abortive or additional work based on the wrong decision by the Engineer); project delays (the Engineer "frustrates the process to delay the project"); physical loss / damage; economic loss / damage (both to the Employer and the Contractor, due to the incorrect

decisions); relationships' sour; loss of future work (the Employer would not want to work again with the "claim oriented" Contractor).

4.3.2 Findings based on the interviews with the Developers

Next the respondents were asked about the perceived reasons for the Engineer's lack of impartiality. Respondent A' opined that although the Engineer under FIDIC is bound to be impartial, the contract itself is often "a mess" with numerous deleted and/ or modified clauses that do not provide for a balanced and sensible agreement.

Respondent B' stated that the Engineer is "appointed and paid by the Employer" and should he act impartially while granting the decision against the Employer, he would lose the business.

Respondent E' stated that although in his opinion the Engineer under the 1987 FIDIC Red Book usually acts impartially, at times it tends to be biased, mainly due to its own faults such as: lack of technical knowledge in certain aspects, lack of professionalism (typical for the Middle East), lack of legal knowledge/ local laws, and failure to "adequately carry out its role in accordance with the Contract and the applicable law".

Respondent D' opined that should the Red Book be strictly followed then the Engineer has a duty to be impartial. However, perhaps because it is the Employer who appoints the Engineer it could be the reason for the Engineer's lack of impartiality.

Next the respondents were requested to provide examples of the disputes/ cases where in their opinion the Engineer had not acted impartially. Respondent A' stated that although there are examples, there are also many discretionary authorities in administering the contract not necessarily always expressly stated somewhere. Respondent B' mentioned an example of finalising the variation and Engineer's determination on the EOT. Respondent C' stated that the examples are usually the cases where the Engineer's involvement is minimal and the Employer grants the instructions, or whenever the Engineer is at fault.

Respondent E' opined that those are usually the cases where the Engineer is at fault (like faulty design or lack of clarity in the design). Respondent D' stated that those were the cases where the interest claims or the escalation claims were made.

Lastly, the respondents were asked about the affect of the Engineer's bias on their contract(s)/ project(s). The following consequences were listed: cash flow issues; additional costs incurred; project delays; physical loss / damage; economic loss / damage; relationships' sour.

4.4 Conclusion

This chapter had provided critical insights on the current situation in the local construction industry, particularly in perceiving the Engineer's impartiality by the users of the Red Book in the UAE. This chapter also analyzed the contracting process, the dispute resolution process, as well as the parties' satisfaction with the Engineer's determinations.

The majority of the respondents from the contracting companies affirmed adopting both 1987 and 1999 edition of the FIDIC Red Book, whilst the developers are mainly utilising the 1987 edition of the Red Book.

As asserted by the contractors participated in the research, the contract is greatly modified by the Employer / the Engineer, and the modifications are being imposed by the Employer. Clauses relevant to the Engineer's authority are heavily modified and "all Engineer's powers are taken away". Sub-clause 2.6 ("Engineer to Act Impartially") is often deleted by the Employers from the contracts that are based on the 1987 edition. Hence, in terms of the Engineer's duties he has no authority without the Employer's approval.

The results of the study thus far suggest that there would appear to be issues with the impartiality of the Engineer in the UAE. Four out of five contractors opined that the Engineer under the Red Book in the UAE is "never impartial" and "it is impossible for him to be" due to the Employer's intervention. It was further stated that the Engineer was "not impartial in most of the projects" or was "rarely impartial". Only Respondent B stated that although generally the Engineer was impartial in his projects, however, the Employer "always has its say".

The views of the representatives of the development companies divided. Respondents A' and E' stated that the Engineer was "usually impartial", at least in majority of the projects. Respondent D' opined that the Engineer was predominantly not impartial, while Respondent C' stated that the Engineer is "never impartial", as he is still an

“agent of the Employer”. Respondent B’ opined that the Engineer acts purely as a “post man” for the Employer. And although the Engineer is generally an impartial body under the FIDIC Red Book in the UAE, it is clear that the Engineer is not impartial in practice as he is paid by the Employer and seeks future business from the same Employer.

With respect to the parties’ satisfaction with the Engineer’s determination under the contract, only Respondent D was satisfied with seventy percent of the claims. Respondent A was satisfied with only fifteen percent of the claims. Respondents E and C were not satisfied with any of the claims. The impartiality is considered “an impossibility” as the Employer’s approvals still have to be made. In other cases, the design is at fault and the Engineer determines the claim in a certain manner so as to protect himself. Respondent B was satisfied with only ten percent of their claims. Speaking of the developers’ level of satisfaction with the claims, only Respondent E’ was satisfied with over seventy five percent of claims.

Amongst the reasons for the incorrect Engineer’s determination the following were listed: the Engineer is receiving the instructions from the Employer and hence there is no independent decision by the Engineer; the Engineer was being biased; or in some instances merely due to the lack of a professional conduct or out of a negligent contract administration.

Answering the question about disputes related to the Engineer’s own conduct, it was stated that there could be numerous reasons mainly resulting from the Employer’s requirements. The delays in issuing approvals often occur due to the pending Employer’s approval. Further, provisional sum items usually bring about many negative consequences for the main contractor as there will inevitably be additional design work being pushed onto the Contractor.

The respondents were also asked whether the Engineer had acted impartially in such disputes in terms of his determination under the contract. Respondents A and E responded negatively while Respondent D commented that in such instances the Engineer would normally agree only to the obvious issues. Respondent A’ stated that the Engineer would often avoid making certain determination if it may lead to exposing himself; when, for example, the design is at fault. Respondent B’ stated that the Engineer is never impartial acting on the Employer’s behalf. Respondent C’

opined that the Engineer would always attempt to find any errors or faults in the Contractor's performance in order to defend himself. Respondent D' stated that the Engineer was not completely impartial. Respondent E' affirmed that in the majority of cases the Engineer had acted impartially.

Amongst the reasons for the lack of impartiality, the following were stated: the Employer exerts excessive influence; the Engineer is empowered by the Employer; the Engineer is being paid by the Employer and seeks future work from the same Employer. Further, the Engineer often fails to provide proper design and attempts to shift the responsibility to the Contractor. There would also appear to be a general lack of understanding of the Engineer's role that has a duty to be impartial but does not realize it. Further, should the Red Book be strictly followed then the Engineer has a duty to be impartial. However, perhaps because it is the Employer who appoints the Engineer it could be the reason for the Engineer's lack of impartiality. Finally, the contract itself is often "a mess" with numerous deleted and modified clauses.

Amongst the examples of the circumstances where the Engineer did not act impartially, the following were listed: the cases where the Engineer's involvement is minimal and the Employer grant the instructions; the design errors cases; faulty work on site under the Engineer's supervision, design coordination, incomplete design, unbuildable design work, wrong material specifications, reduced bulk measurements in the BOQ; compelling the Contractor to proceed with the variations in the absence of a formal approval or agreed price; late approvals; contract misinterpretation.

Finally, the respondents were asked whether the Engineer's bias had affected their projects and what consequences they have faced. The following were mentioned: cash flow issues; additional costs incurred; project delays; physical loss / damage; economic loss / damage; relationships' sour; loss of future work.

Since the impartiality issue has now been established, the next step would be a discussion on the solutions that may be proposed to overcome this issue. The solutions will be discussed in the next chapter and are predominantly based on the information derived from the data collected for the purpose of this study.

5. Discussions

5.1 Introduction

This chapter analyzes the possibility of further amendments to FIDIC Red Book and any other solutions that may be proposed to overcome current challenges that exist in the UAE construction industry as a result of present application of FIDIC provisions.

It would appear that one of the obvious solutions would be a separation of various roles of the Engineer, as being suggested by Sir Latham in his report⁶⁵. There are examples of the engineering firms in England where certain personnel is handling the technical matters, administering the contract or else acting as the Employer's agent, and other personnel decide on the disputes that arise. The latter is not being involved in the same duties as the former.⁶⁶

Further, some practitioners suggest stepping away from the standard dispute resolution process of FIDIC form of contract and specifically from the Engineer's involvement in it.⁶⁷ In this context, the introduction of DAB is being particularly favored however further improvements are highly suggested and will be discussed further in this chapter.

5.2 Discussion on the solutions proposed by the participants

Various solutions to overcome the issue with the Engineer's impartiality were offered and debated by the participants of this research.

As one of the possible solutions to the issue, it has been suggested that the Engineer is to be jointly selected and paid by both the Employer and the Contractor. Forty percent of the respondents opined that it might solve the issue or at least contribute to its resolution; however, with some reservations attached to it, namely it would help only if it was consistently employed. Respondent B stated that although it would help, he would however rather take the risk of having to deal with the lack of impartiality than covering fifty percent of the Engineer's fees.

⁶⁵ Sir Latham suggested that the contract administration and the adjudication functions need to be separated and performed by two different entities. Sir Latham also suggested that the Project Manager should not have a dual role on the project and should act entirely as the Employer's agent. See Latham, above n 13.

⁶⁶ Nisja, above n 26.

⁶⁷ Particular reference is being made to the government contracts in the UK. See Shorland, above n 64.

Debating the solution proposed, it has been suggested by some of the participants that the solution will not help simply because the Engineer will still attempt to escape the responsibility for the design errors and such joint selection will only result in further disputes. Besides, the contract would need to be fundamentally changed. Generally the contracts in the UAE are drafted in a way that the “majority of risks are allocated to the Contractor”. Furthermore, the Engineer will still seek future projects from the same Employer. Hence, he may be selected by both parties for one particular project however there will still be a possibility of bias as the Engineer will be seeking future projects from the same Employer.

Finally, in majority of the projects, the Engineer is initially appointed by the Employer to design the works. The site supervision services (i.e. the role of the Engineer under the Red Book contract) are mainly carried out by the site supervision team of the designer. Hence, even if they are jointly paid, the lack of impartiality will still remain since the Engineer may tend to be biased towards the party that appointed him first, and in majority of cases it would be the Employer who had initially appointed the designer, way before the award of the construction contract. Another solution, however not the preferred one, would be to have an independent supervision consultant (i.e. not the designer) to be jointly appointed by the Employer and the Contractor to carry out the role of the Engineer under the construction contract, however it will give rise to other issues in terms of establishing liability in the event of a structural failure (decennial liability under the UAE Civil Code).

Another alternative solution that was discussed is the contractual arrangement where the Engineer does not act as an agent to either party. This was supported by sixty percent of the respondents, however, again, with some reservations attached to it. Although the general feedback was that it would improve or “probably improve” the impartiality, there should be an independent party to determine disputes and the drafting of the contract must be very clear. The Engineer must not be biased, - the Employers prefer FIDIC as it allows them to take control; besides, under the Red Book 1999 edition the Engineer *is* the Employer’s agent. Hence, good in theory, the respondents were not confident whether it can be achieved in reality.

Respondent D' did not support this route as it would result in other issues, for example, in terms of establishing the liability in the event of a structural failure as mentioned above.

The next solution discussed was the introduction of DAB under the 1999 Red Book.⁶⁸ Although general feedback was that it is a generally good and quick procedure and may facilitate solving the problem "to a certain extent", however, there was some amount of scepticism attached to it, particularly with regard to the industry awareness and the parties' willingness to appoint DAB as required. Further, with respect to the procedure, full awareness of the parties is sought.

The majority of the respondents have not used the DAB in their projects. However it is seen as more practical comparing to arbitration that is considered "too heavy, legal and complex". Further, it would appear to be obvious that the DAB was introduced in the Red Book 1999 edition by the FIDIC drafters simply due to the Engineer's lack of impartiality.

Respondent D' suggested that utilising DAB in the projects will definitely lessen the issues with the impartiality, however provided that the DAB meets frequently to address the project matters and concerns. Although there is an additional cost for appointing the DAB however it may reduce the costs and the hassles of going through a more expensive arbitration or the litigation process. He further added that in the case of any disputes the same Engineer can be utilised as a DAB.⁶⁹

The respondents that argued against using DAB opined that it is not practical and is only feasible for mega projects – the likes of Channel Tunnel, Burj Khalifa etc. And while it is still possible to employ the DAB on the projects, the decision must be quick. Besides, the DAB will not be really necessary should the statutory adjudication be provided for, in the sense that it is quick (the decision is issued in 28 days).

⁶⁸ As previously discussed in chapter 2, and according to Totterdill, "the only way to obtain a truly impartial decision is through the DAB"

⁶⁹ I personally do not favour this approach due to the reasons as also being suggested by Totterdill: "...this cannot be recommended. In practice the Engineer tends to be regarded as an instrument of the Employer and in the 1999 Conditions he is defined as Employer's Personnel, which can only enhance this belief. The DAB, provided it is properly constituted, is the only way to obtain a fast and truly independent decision on a dispute." See Totterdill, above n 41.

Respondent A' noted that he is a board member himself and in reality DAB is "more of a game". It is normally a panel of three highly experienced judges that usually step in whenever one party is dissatisfied with the Engineer's determination. Although in his opinion the DAB would generally work, it becomes vulnerable where the Engineer does not issue the determination and refers the dispute directly to DAB. Further, he stated, the limits shall be established in terms of timelines as well as the dispute value, whereas no dispute under AED 5-10 million should be referred to DAB.

Generally, although the DAB is seen as a "good step", it was advised to endeavour avoiding disputes altogether in the first place.

The respondents were then invited to elaborate on any alternative solution they may have in mind. There were various and distinct solutions proposed.

Respondent C proposed for the contractors to simply boycott working under the conditions imposed by the Employers. Further, he suggested keeping the contracts simple and as standard as possible. Fewer parties need to be involved. He also opined that a good builder is the key and in this context he advised to use the Design & Build form of contract whenever possible. Finally, he invited all the representatives of the UAE construction industry to get familiar with the Latham report and for the relevant authorities to introduce these fundamentals into existing UAE laws and legislation.

Respondent B stated that under the Red Book 1987 edition the parties avail the notion of the impartiality; however, it cannot be further improved due to the numerous reasons as explained in the Chapter four. There is a vehicle in the 1999 edition where the parties may mutually discuss and agree to expressly include in the contract that "*the Engineer is to act impartially*". The Employers in the UAE must take a fair approach and it is in fact in their interest simply because the Engineer effectively acts as a judge in determining the disputes.

Respondent E proposed to introduce the alliance contracting, or at least utilise more of a Design & Build form of contract. However, he stated, the Employers in the UAE do not particularly recognize these forms (especially the alliance contracting).

As one of the possible solutions, an introduction of a panel similar to DAB was proposed by the Respondent D. The panel should consist of senior members of the parties – the Employer, the Contractor and the Engineer/ the Designer/ the Consultant.

The members of this panel would discuss and agree on the project disputes. However, the financial disputes and the variations must be determined by an independent QS firm hired by the Employer. It is a norm in the UK and is also in line with the Latham report. Further, there must be an independent Project Management firm involved in administering the contract; this should not be undertaken by the Engineer. In this respondent's opinion, the Engineer should only undertake the design of the project and no further roles should be assumed by the Engineer. Likewise, the Project Manager should hold no ownership of the design. Again, it is a norm in the UK and is in line with the Latham report that points out that all of these roles (Adjudicator/ Engineer + Architect/ Quantity Surveyor/ Project Manager) need to be separated. For the projects of smaller value the roles of the Architect and the Project Manager may be combined however a separate QS firm is still mandatory.

Respondent B' opined that the best solution would be the appointment of the Engineer according to the procedures similar to that of the appointment of an Arbitrator. The best possible way is the appointment of the Engineer by the third party – the likes of DIAC, DIFC, ICC, ADCCAC etc. Further, he suggested that the Engineer's fees should be equally shared between the two parties. The Contract between the Employer and the Engineer should be transparent. The Contractor should be able to request for the amendment of the clauses that contradict the Contract between the Employer and the Contractor, otherwise the Contract with the Engineer shall be tripartite. In this case FIDIC will have to release a new form of Contract. Further, the contract should provide for the Engineer's management responsibility as well as some sort of liquidated damages for mismanagement, failure to complete on time etc.

Some of the further solutions proposed by the respondent A were relevant to the improvement of the dispute resolution mechanism. As suggested by this respondent, the Employers in the UAE and generally in the region prefer to leave the resolution of the disputes until the contract completion, hence, he opined, should there be a disagreement, the dispute resolution mechanism must provide for a quick resolution procedure. For example, clause 67 stipulates 84 days for the Engineer's decision that follows by the 56 days of amicable settlement procedure. Total of 140 days is an extremely long timeline for a dispute resolution in construction. He further advised that the adjudication worked well in the UK and the decision is very quick – 28 or maximum of 42 days, with both parties submitting their case in writing and attending

an oral meeting. However, he stated, it seems very unlikely for it to be introduced in the UAE since there is no will from the concerned stakeholders and authorities. Overall, he suggested that the arbitration for the disputes of smaller value is not commercially feasible; hence an independent party should be introduced (a forum similar to DAB) to apply further pressure on the Engineer in terms of the possibility of biased decisions. With respect to DAB, he noted that the provision for DAB is being deleted from the UAE contracts. Furthermore, DAB is a solution provided that the parties agree to incur additional expenses. Finally, for any DAB to succeed the parties must be open to resolving the issues.

Finally, the arbitration process through centres like DIAC is still preferred by the non-government entities in the UAE and it will to a large extent be the solution. However, having an additional DAB process prior to arbitration / litigation would be an added advantage with the presumption that parties would commit to getting resolution from DAB without having to go through much more expensive process of arbitration / litigation.

Respondent E' suggested that various solutions may be: using the standard Consultancy Service Agreement that promotes professionalism and impartiality and using standard Conditions of Construction Contract (the likes of FIDIC) without amending the role of the Engineer. Further, he opined, it is worth introducing an Engineer that is more accountable through the application of law or is responsible to the regulatory bodies like SOE, RICS and ICES. Generally, the Engineer's team members should be members of professional bodies like RICS, ICES, SOE that promote trusts, impartiality and professional ethics. Finally, he stated, the Engineer should not be an employee of the Employer's company (as it appears to be in some bespoke contracts based on FIDIC).

Respondent A' stated that only alliance or partnering structure where each party has a stake and "pain/ gain" is shared can be the solution. However, such form of contract is not particularly favoured by the Employers in the UAE and the region.

For the purpose of improving the situation with the impartiality of the Engineer, the respondents were invited to identify the contract provisions that, in their opinion, should have been included or amended in the FIDIC Red Book.

Generally it has been suggested to attend to clauses related to the Engineer's role in claim handling and dispute resolution. Red Book often empowers the Engineer to issue the decision only upon the Employer's approval (with the list of delegated authorities expressly provided for). It has been suggested that it may facilitate the process if the Engineer's decisions would not need to be approved by the Employer (reference to sub-clause 2.1 – Engineer's Duties and Authority).⁷⁰ If this is absolutely not achievable, the time constraints for the Employer's approvals should then be contractually stipulated (possibly 5-10 days, at least for the major disputes on EOT, additional cost etc). Further, sub-clause 2.5 (Instructions in Writing), sub-clause 52.2 (Power of Engineer to Fix Rates) and sub-clause 44.1 (Extension of Time for Completion) should stipulate the period of time. Generally, with regard to the EOT it was noted that presently the majority of the contacts stipulate that the EOT should be approved by the Engineer only upon consulting with the Employer. Whereas the Engineer perhaps should be taking such decision independently, without any further re-appraisal by the Employer, otherwise it would be a conflict of interest.

With respect to the Red Book 1999 edition, it was suggested to include a provision for the Engineer to act in an impartial manner similar to that in the Red Book 1987 edition, although it is somewhat covered by the requirement for the Engineer to provide a "fair determination". Generally, it has been suggested that no particular improvement can be achieved by adding any particular clause as it "boils down" to the way parties behave.

Respondent C' opined that amending current FIDIC conditions will not serve the purpose as long as the Engineer is kept out of party to contract.

Finally, in connection with the impartiality issue, the respondents were asked about their opinion on the statutory adjudication in general and its future in the UAE as one of the possible solutions to the issue.⁷¹

Seventy percent of the respondents confidently stated that the adjudication would definitely play a great role and hopefully will contribute to the resolution of the issues

⁷⁰ As discussed in chapter 2.5, and supported by Sunna and Al Sadoon, above n 49 and above n 51.

⁷¹ It is worth noting that lack of confidence in the architect / contract administrator impartiality was one of the reasons for introducing UK Adjudication act in 1996.

with the Engineer's impartiality, provided, however, that all the concerned stakeholders including the legislators are willing to implement it.

However, there was some amount of scepticism attached to this subject. The problem some respondents noted is that certain Employers in the UAE are so powerful that they are "above the law". Furthermore, for example DEWA uses heavily amended form of FIDIC contract – the question therefore arises as to how one persuades the government Clients to introduce the notion of statutory adjudication. Some of the contracts imposed by certain Employers in the UAE will have to be changed drastically. Besides, numerous projects are for the government bodies. Hence, introducing the statutory adjudication in the UAE would be extremely difficult.

Respondent D commented that in the UAE government entities do not even agree on the arbitration as a dispute resolution method and prefer litigation instead. It should be noted however, that litigation is an "expensive affair" and majority of the Contractors refrain from choosing that path and thus would generally compromise in order to reach a solution with the Employers. Hence, the adjudication becoming a statute, in his opinion, does not have much future in the UAE.

Respondents B, D and E have not been personally involved in the adjudication or have not experienced it as they have been overseas and have not practiced in the UK however they were aware of the notion of statutory adjudication from their colleagues and regard it a good, less expensive (comparing to arbitration) and quick procedure that encourages resolving disputes. In the UK, it had created an industry by itself. However, the concern that had been raised by one of the respondents is that the decision is not final and the parties may still pursue arbitration.

Respondent A' expressed his sceptical views on the UAE laws. Furthermore, in his opinion, the experts in UAE are inexperienced and generally produce biased, "emotional" reports. Adding to the problem, the parties are inexperienced too and are not able to make any use of such reports. He further expressed his dissatisfaction with the arbitration support in the UAE, where he commented that there was "nothing good" that he had seen. Therefore he is being very sceptical, especially since there is no case precedence in the UAE and for "200 similar cases" a different decision may be eventually obtained with every new trial.

Finally, as commented the Respondent B, fairness is eventually what the parties desire. Thus, UAE construction industry should move along with the world.

5.3 Conclusion

Numerous various solutions to overcome current challenges that exist in the local construction industry with respect to the impartiality of the Engineer under the FIDIC Red Book have been discussed in this chapter.

A separation of various roles of the Engineer as one of the possible solutions was supported by several respondents.

The possibility of the Engineer to be jointly selected and paid by both parties was not particularly welcomed as, in the opinion of the respondents, the possibility of bias would still remain.

A contractual arrangement where the Engineer would not act as an agent to either party was supported, however with the reservation that it is expressly provided for in the contracts based on the 1999 Red Book that the Engineer is ‘*to act impartially*’.

Further, it has been suggested stepping away from the standard dispute resolution process of FIDIC and specifically from the Engineer’s involvement in it. In this context, the introduction of DAB is particularly favored however further improvements were highly suggested, namely: parties should be fully aware of and follow the procedures for the appointment of the DAB; the parties should be willing to implement the DAB as a dispute resolution method as well as to incur additional cost. Finally, it has been suggested that the DAB would only be practical and feasible for the mega projects.

The respondents also elaborated on various alternative solutions they had in mind. Generally, standardisation of contracts was proposed (for both the Consultant agreement and the agreement between the Employer and the Contractor); less amendments should be made to the standard FIDIC form of contract, particularly to the clauses that relate to the Engineer’s role under the contract; the delegation of power should be eliminated altogether.

Latham fundamentals are to be introduced, and based on the same the local laws and legislation are to be improved.

Appointment of the Engineer should be undertaken according to the procedures similar to that of the Arbitrator's appointment i.e. by a third party like DIAC, DIFC, ICC, ADCCAC etc.

The use of the Design & Build form of contract shall be widened and the alliance contracting shall be introduced in the local construction industry.

The Contract between the Employer and the Engineer should be transparent. The Contractor should be able to request for the amendment of the clauses that contradict the Contract between the Employer and the Contractor, otherwise the Contract with the Engineer shall be tripartite. In this case FIDIC will have to release a new form of Contract. Further, the contract should provide for the Engineer's management responsibility as well as some sort of liquidated damages for mismanagement, failure to complete on time etc.

An independent party should be introduced (a panel similar to DAB) to apply further pressure on the Engineer in terms of the possibility of biased decisions. The Engineer shall be held more accountable through the application of law or is to the regulatory bodies like SOE, RICS and ICES.

Generally it was suggested to attend to clauses related to the Engineer's role in claim handling and dispute resolution, the introduction of DAB being the example. It has been suggested that the Engineer's decisions should not need to be approved by the Employer or else the time constraints for the Employer's approvals should be contractually stipulated. Further, sub-clauses 2.5 (Instructions in Writing), 52.2 (Power of Engineer to Fix Rates) and 44.1 (Extension of Time for Completion) should stipulate the period of time. A quicker dispute resolution procedure must be introduced – current FIDIC timeframe is totalling to 140 days and is generally too long for a construction dispute.

Generally, it has been suggested that no particular improvement can be achieved by adding any particular clause as it "boils down" to the way parties behave. Further, amending current FIDIC conditions will not serve the purpose as long as the Engineer is kept out of party to contract.

Seventy percent of the respondents confidently stated that the statutory adjudication would definitely play a great role and will contribute to the resolution of the issue,

provided, however, that all the concerned stakeholders including the legislators are willing to implement it. However, as numerous projects are for the government clients, introducing the statutory adjudication in the UAE would be extremely difficult. Hence, although the statutory adjudication is regarded as good, less expensive (comparing to arbitration) and quick procedure that encourages resolving disputes, the adjudication becoming a statute does not have future in the UAE.

6. Conclusions and Recommendations

6.1 Conclusions

The thesis of this research had been chosen due to the extent of controversy around the role of the Engineer under the FIDIC Red Book. Furthermore, although various previous studies have attempted to discuss the issues with the Engineer's impartiality, this study is unique in a sense that there were no attempts to tackle this topic in the context of the UAE.

The study was seeking to answer whether the Engineer under the FIDIC Red Book in the UAE is perceived impartial and the findings suggest that the majority of the Red Book users in the UAE do not perceive the Engineer as an impartial body under the contract. Further, the study was seeking to answer whether the Engineer tends to be biased towards the Employer and the findings suggest that it would appear that it is often the case. Finally, the study was seeking to propose the solutions to overcome the issue with the impartiality and such various solutions were discussed in details within chapter five of this study. The above listed objectives were also in line with other objectives such as establishing the reasons for the Engineer's bias and its consequences on the projects and the parties' contractual relationships. The study also analyzed the contracting process, the dispute resolution process, as well as the parties' satisfaction with the Engineer's determination under the contract.

Having reviewed an extensive list of the literature on the subject, particularly the commentaries on the relevant FIDIC Red Book provisions and the articles concerning the subject of the Engineer's role under the FIDIC Red Book, and having interviewed the users of the Red Book in the UAE, it is not no longer as surprise that a survey⁷² conducted in the UK prior to the release of the Red Book 1999 edition revealed that the role of the Engineer under FIDIC was considered one of its worst features. Widespread concerns have often been raised over the impartiality of the Engineer due to his contractual engagement with the Employer and numerous other reasons as discussed in great details in chapter four of this study. It would also appear that many consider the change in the Red Book 1999 edition a mere reflection of what has long

⁷² EIC/FIDIC Questionnaire Survey, above n 5.

been an industry's reality (i.e. the Engineer had always been a true agent of the Employer, irrespective of the contractual provisions).

The findings of the study had proven that the Employer often expressly limits the Engineer's authority through the contract provisions, particularly the authorities related to the cost and/ or time variations. What is more, many Employers misinterpret FIDIC provisions by assuming that the Employer enjoys the authority to delay and/ or reject the Contractor's entitlement for claims by not releasing "the specific approval" for the Engineer to proceed. (For example, authorities in Abu Dhabi expressly assign to themselves a sole discretion in instructing cost variations, while the conditions of contract used by Dubai Municipality heavily depart from the standard FIDIC conditions so that the Engineer is required to obtain the Employer's approval on all matters related to the programme, contractor's payments and the issuance of completion certificate.)

Having interviewed 10 representatives of some of the major contracting and development companies in the UAE, I would tend to conclude that there are indeed issues with the impartiality of the Engineer in the UAE. Four out of five contractors participated in the research opined that the Engineer under the Red Book in the UAE is "never impartial" and "it is impossible for him to be" due to the Employer's intervention.

As further asserted by the contractors, the contract is greatly modified by the Employer / the Engineer, and the modifications are being imposed by the Employer. Clauses relevant to the Engineer's authority are heavily modified and "all Engineer's powers are taken away". Sub-clause 2.6 ("Engineer to Act Impartially") is often deleted by the Employers. Hence, the Engineer has no true authority without the Employer's approval.

The views of the representatives of the development companies divided. Respondents A' and E' stated that the Engineer was "usually impartial", at least in majority of the projects. Respondent D' opined that the Engineer was predominantly not impartial, and the Respondent C' stated that the Engineer is "never impartial", as he is still an "agent of the Employer". Respondent B' opined that the Engineer acts purely as a "post man", by merely officially issuing the claims finalised by the Employer to the Contractor. And although the Engineer is generally an impartial body under the FIDIC

Red Book in the UAE, it is clear that he can never act impartially as he is paid by the Employer and seeks future business from the same Employer.

With respect to the parties' satisfaction with the Engineer's determination under the contract, only two respondents were satisfied with 70-75 percent of the claims. Two respondents were satisfied with only 10-15 percent of the claims. The reality is that although an impartial determination may have been made by the Engineer it may still require an approval by the Employer who often rejects the Engineer's determination. In other cases, the design is at fault and the Engineer determines the claim in a certain manner so as to protect himself. Two respondents were not satisfied with any of the claims determined by the Engineer. In their opinion, the impartiality was "an impossibility" as the Employer's approvals still have to be made.

Amongst the reasons for such a determination the following were listed: the Engineer was simply not permitted to decide on the case properly, as he was being instructed by the Employer; with Respondent B' admitting that they "always force" the Engineer to act in the Employer's favour. Two other respondents stated that it was due to the Engineer's bias, or in some instances merely due to the lack of professional conduct/knowledge or out of a negligent contract administration.

With respect to disputes related to the Engineer's own conduct the respondents affirmed that there were many such disputes, mostly due to the Engineer's inability to make the right decisions however numerous other reasons were mentioned mainly resulting from the Employer's requirements or his pressure on the Engineer to release the design for tender. Further, the delays in issuing approvals often occur due to the pending Employer's approvals. Majority of the respondents revealed that the Engineer did not act impartially in such disputes while one of the respondents commented that the Engineer would normally agree to obvious issues but will attempt to shift the responsibility for the remaining errors to the Contractor. Further, the Engineer often avoids making a certain determination if it may lead to exposing himself; when, for example, the design is at fault.

Amongst the reasons for the lack of impartiality, the following were stated by the respondents: the Employer exerts excessive influence; the Engineer is empowered by the Employer; the Engineer is paid by the Employer and is seeking future work from the same Employer. Further, the Engineer often fails to provide proper design and

attempts to shift the responsibility to the Contractor; the Engineer is often at fault and lacks the technical knowledge in certain aspects, the professionalism (usual in the Middle East), and the knowledge of local laws; and fails to adequately carry out its role “in accordance with the Contract and the applicable law”.

Amongst the examples of the circumstances where the Engineer did not act impartially, the following were listed: the cases where the Engineer’s involvement is minimal and the Employer grant the instructions, or whenever the Engineer is at fault (faulty design or lack of clarity in the design); the design errors cases where the Engineer attempts to shift the responsibility to the Contractor; faulty work on site under the Engineer’s supervision, design coordination, incomplete design, unbuildable design work, wrong material specifications, reduced bulk measurements in the BOQ in order to decrease the tender price; compelling the Contractor to proceed with the variations in the absence of a formal approval or agreed price; late approvals; contract misinterpretation - missing or irrelevant words, amended standard form where clauses are not properly interlinked etc.

Numerous various solutions to overcome current challenges that exist in the local construction industry with respect to the impartiality of the Engineer under the FIDIC Red Book have been discussed in chapter five of this study.

A separation of various roles of the Engineer as one of the possible solutions was supported by several respondents.

The possibility of the Engineer to be jointly selected and paid by both the Employer and the Contractor was not particularly welcomed as, in the opinion of the respondents, the possibility of bias would still remain.

A contractual arrangement where the Engineer should not act as an agent to either party was supported, however with the reservation that it is expressly provided for in the contract that the Engineer is “*to act impartially*”.

Further, it has been suggested stepping away from the standard dispute resolution process of FIDIC and specifically from the Engineer’s involvement in it. In this context, the introduction of DAB is particularly favored however further improvements were highly suggested, namely: parties should be fully aware of and follow the procedures for the appointment of the DAB; the parties should be willing to

implement the DAB as a dispute resolution method as well as to incur additional cost. Finally, it has been suggested that the DAB would only be practical and feasible for the mega projects.

Standardisation of contracts was highly recommended (for both the Consultant agreement and the construction contract); lessen amendments should be made to the standard FIDIC form of contract, particularly to the clauses relevant to the Engineer's role under the contract; the delegation of power should be eliminated altogether.

Latham fundamentals are to be introduced, and based on the same the local laws and legislation are to be improved.

Appointment of the Engineer should be undertaken according to the procedures similar to that of the Arbitrator's appointment i.e. by a third party like DIAC, DIFC, ICC, ADCCAC etc.

The use of the Design & Build form of contract shall be widened and the alliance contracting shall be introduced in the local construction industry.

The Contract between the Employer and the Engineer should be transparent. The Contractor should be able to request for the amendment of clauses that contradict the Contract between the Employer and the Contractor, otherwise the Contract with the Engineer shall be tripartite. Further, the contract shall provide for the Engineer's management responsibility as well as some sort of liquidated damages for mismanagement, failure to complete on time etc. In this case FIDIC will have to release a new form of Contract.

The Engineer shall be held more accountable through the application of law or to an independent regulatory body like SOE, RICS and ICES.

Generally, it has been suggested that no particular improvement can be achieved by adding any particular clause as it "boils down" to the way parties behave. Amending current FIDIC conditions will not serve the purpose as long as the Engineer is kept out of party to contract. It is however advisable to attend to clauses related to the Engineer's role in claim handling and dispute resolution. The Engineer's decisions should not need to be approved by the Employer or else the time constraints for the Employer's approvals should be contractually stipulated. Sub-clauses 2.5 (Instructions

in Writing), 52.2 (Power of Engineer to Fix Rates) and 44.1 (Extension of Time for Completion) should stipulate the period of time.

Finally, seventy percent of the respondents confidently stated that the statutory adjudication would definitely play a great role and will contribute to the resolution of the issue, provided, however, that all the concerned stakeholders including the legislators are willing to implement it. However, as numerous projects are for the government clients, introducing the statutory adjudication in the UAE would be extremely difficult and hence does not have future in the UAE. Nonetheless, the UAE construction industry absolutely must move along with the modern construction world.

6.2 Recommendations for Further Improvements

Based on the above findings, I would like to propose the following recommendations that may be considered by the concerned stakeholders (particularly, FIDIC association/ drafters as well as the decision makers in the local construction industry):

1. The possibility of having to release a new form of Contract according to an earlier recommendation to introduce a new form of tripartite Contract between the Employer, the Engineer and the Contractor may be further explored. This new form of contract should perhaps include provisions for the liquidated damages for the Engineer's mismanagement, failure to complete on time etc.
2. It is hoped that the FIDIC drafters would consider the findings of this study in order to further improve the efficiency of the key contractual provisions related to the Engineer's role in claim handling and dispute resolution. Perhaps, the Engineer's decisions should never need to be approved by the Employer or else the time constraints for the Employer's approvals should be contractually stipulated. Sub-clauses 2.5 (Instructions in Writing), 52.2 (Power of Engineer to Fix Rates) and 44.1 (Extension of Time for Completion) should stipulate the period of time. The delegation of power shall be eliminated altogether.
3. The use of the Design & Build form of contract shall be promoted and the alliance contracting shall be introduced in the local construction industry.
4. Latham fundamentals are to be introduced, and based on the same the local laws and legislation are to be improved ad needed.

6.3 Recommendations for Future Research

Finally, based on the above findings, I would like to conclude this research by the following recommendations on the next steps that could be undertaken and that may serve as a thesis for further research:

1. The possibility of appointing the Engineer by a third party like DIAC, DIFC, ICC, ADCCAC etc should be explored. A qualitative research could possibly be conducted amongst the representatives of the above centres as well as the stakeholders from the local construction industry to investigate the level of support as well as proposed arrangements to implement this solution.
2. In order to discourage the possibility of issuing any biased decisions, the Engineer shall be held more accountable through the application of law or to an independent regulatory body like SOE, RICS and ICES. Perhaps, certain new legal provisions should be considered by the legislators in the UAE. This could be further researched with the involvement of the representatives of the above professional associations as well as local legislators, to discuss the proposed amendments to the existing law (if any to be introduced) and the timelines for issuing the draft of the new / amended law provisions.
3. Finally, a possibility of introducing a statutory adjudication in the UAE should, in my humble opinion, be further considered and looked at with the involvement of all the concerned stakeholders including the legislators. The notion of the statutory adjudication in the UK may be researched/ explored, a similar (but tailored to the UAE code and Shari'a principles) draft law introduced and improved as needed bearing in mind the "lessons learned" out of implementing the UK Adjudication Act and the way it worked in practice.

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Appendix A - Interview Questions

Dear Sir/ Madam,

I would like to invite you to participate in an interview for a postgraduate research study. The aim of the research is to establish the users' perceptions on the impartiality of the Engineer under the FIDIC Red Book in the UAE.

The form of contract chosen for this research are as follows:

1. Conditions of Contract for Works of Civil Engineering Construction (Fourth Ed. 1987)
2. Conditions of Contract for Construction For Building and Engineering Works designed by the Employer (First Ed. 1999)

The objectives of the research are as follows:

- a) To establish the impartiality of the Engineer from the perspectives of the users of the FIDIC Red Book in UAE;
- b) The establish the reasons for the Engineer's lack of impartiality (if established from a) above);
- c) The establish the consequences of the Engineer's lack of impartiality (if any) on the projects and the parties' contractual relationships;
- d) To identify solutions to improve the impartiality of the Engineer under the FIDIC Red Book.

The interview will last about 30 minutes. With your permission, I will record the interview for the purposes of transcription. This interview is **strictly confidential**. Your identity will never be revealed and your responses will not be attributed to you. Your participation is **voluntary**. However, shall you decide to take part, you are free to **withdraw** at any time and without giving a reason.

SECTION A – INTERVIEWEE'S BACKGROUND

1. How many years of professional experience do you have in the following:
(Please do not overlap (double count) your answers in a) and b).

- a. Construction industry: years
- b. Legal (if any):years
- c. Total (a) + (b) from above: years

2. What is your **main** professional background? Choose **one** answer only.

[] Architecture/town Planning/landscape architecture/interior design

- Building/construction
- Engineering – civil/structural
- Engineering - electrical/mechanical
- Engineering – other e.g. transport, materials, chemical etc
- Legal
- Management
- Quantity surveying
- Other (please specify)

3. Based on the following, what is your **primary** area of work? Choose **one** answer only.

- Judicial
- Construction professional e.g. architect, engineer, quantity surveyor
- Adjudicator / Arbitrator / Mediator
- Solicitor or Barrister
- Contractor company
- Subcontractor company
- Supplier company
- Government or government owned companies
- Private client company e.g. developer or other companies
- Academic
- Others (please specify)

SECTION B – GENERAL OVERVIEW OF THE USE OF FIDIC CONTRACT FORM IN THE ORGANIZATION

1. What type of the FIDIC form of contract is mostly used by your organization?
 - [] Conditions of Contract for Works of Civil Engineering Construction (Fourth Ed. 1987)
 - [] Conditions of Contract for Construction For Building and Engineering Works designed by the Employer (First Ed. 1999)
 - [] Others, please specify:
2. Do you normally use a modified or an unmodified version of the FIDIC form of contract?
3. If you normally use a modified version of the FIDIC form of contract, which clauses do you amend and why? (Please provide the details of the amendments of contract clauses that are particularly relevant to the Engineer's Role under the contract)

SECTION C – CONTRACT DISPUTES AND THE ENGINEER (This section focuses on the contract disputes; Engineer's role under FIDIC & Engineer's impartiality; and reasons, consequences & proposed solutions to overcome issues with the impartiality)

Contract Disputes and the Engineer: Impartiality – a myth or a reality?

1. What is the percentage of claims determined by the Engineer under the contract that you were satisfied with? In your opinion, was the Engineer being impartial in your projects?
2. How many of the disputes eventually resorted to litigation/ arbitration/ other ADR? Was the decision obtained at the end of the process:
 - a. Same as previously determined by the Engineer;
 - b. Different, but insignificantly;
 - c. Significantly different?
3. Was it eventually awarded to your satisfaction? I.e. have you lost or won the case?

4. If you have eventually won the case but the initial Engineer's determination was significantly different, would you say that it was due to:
 - a. the Engineer being biased to the other party, or
 - b. the lack of his professional conduct/ knowledge and/ or merely out of negligent contract administration?
 - c. others (please specify)

5. Were there any disputes related to the Engineer's own conduct?

6. If you answered "yes" to Q5, please elaborate what was the nature of the dispute:
 - a. Quality and functionality of the design;
 - b. Project buildability;
 - c. Accuracy of drawings, specifications and BOQ;
 - d. design ambiguities,
 - e. contradiction between plans and specifications;
 - f. late supply of design information/ drawings etc;
 - g. delay in issuing instructions / approvals / certificates;
 - h. Engineer's instructions;
 - i. determining value of work;
 - j. determining variations;
 - k. exceeding the powers granted by the Employer;
 - l. Disruption of progress;
 - m. Failure to consult with the parties;
 - n. Failure to adequately carry out the supervisory role;
 - o. Failure to carry out adequate budget control;
 - p. Contract interpretation;
 - q. others, please specify.

7. How were such disputes handled in terms of the Engineer's determination under the contract? Would you be able to say that the Engineer had acted as a completely independent and impartial body in this case(s)?

8. Would you agree that the Engineer is an impartial party under the FIDIC contract (Red book) in the UAE? If you disagree, please elaborate further.

9. Please provide examples of the disputes/ cases where you believe the Engineer had not acted impartially.

Impartiality and the lack of it: Reasons, Consequences and Solutions

1. Should you believe that the Engineer under the Red Book lacks impartiality (based on your professional experience), please explain what the reasons for the Engineer's lack of impartiality are from your perspective?

2. Has the alleged bias of the Engineer affected your contract(s)/ project(s)? In particular, have you faced the following consequences:
 - a. cash flow issues;
 - b. additional costs incurred;
 - c. Project delays;
 - d. Physical loss / damage;
 - e. Economic loss / damage;
 - f. Relationships' sour;
 - g. Others, please specify.
3. In your opinion, what are the solutions that may be pursued in order to overcome the issues with impartiality? Will the problem be solved if the Engineer is jointly selected and paid by both the Employer and the Contractor?
4. Should the problem be eliminated if the Engineer would not act as an agent to either party?
5. Do you perceive the introduction of DAB under the 1999 Red Book as a sufficient solution to this?
6. Please elaborate on any alternative solution you may have in mind.
7. For the purpose of improving the situation with the impartiality of the Engineer, please identify the contract provisions that, in your opinion, should have been included or amended in the FIDIC Red Book.
8. In connection with impartiality issue, do you believe in statutory adjudication and its future in the UAE (and/or the region) as one of the possible solutions to the issue?

In anticipation of your participation, I thank you for your valuable time and input to this research study.