FIDIC 1999 (Red Book) Dispute Adjudication Board's: The UAE Construction Industry Perspective

رؤية قطاع الانشاءات في الامارات العربية المتحده عن:
مجلس فض المنازعات في عقود الفديك 1999 (الكتاب الأحمر)

by

DARREN BRUEN

A dissertation submitted in fulfilment
of the requirements for the degree of
MSc CONSTRUCTION LAW AND DISPUTE RESOLUTION
at
The British University in Dubai

Dr. Abba Kolo
January 2018

DECLARATION

I warrant that the content of this research is the direct result of my own work and that any use made in it of published or unpublished copyright material falls within the limits permitted by international copyright conventions.

I understand that a copy of my research will be deposited in the University Library for permanent retention.

I hereby agree that the material mentioned above for which I am author and copyright holder may be copied and distributed by The British University in Dubai for the purposes of research, private study or education and that The British University in Dubai may recover from purchasers the costs incurred in such copying and distribution, where appropriate.

I understand that The British University in Dubai may make a digital copy available in the institutional repository.

I understand that I may apply to the University to retain the right to withhold or to restrict access to my thesis for a period which shall not normally exceed four calendar years from the congregation at which the degree is conferred, the length of the period to be specified in the application, together with the precise reasons for making that application.

_____

Signature of the student

COPYRIGHT AND INFORMATION TO USERS

"*Since the beginning of time, disputes have emerged and flourished and so, too have the methods of resolving those disputes throughout the centuries*".[1]

N G. Bunni

[1] N G. Bunni, 'What has History Taught Us in ADR? Avoidance of Dispute!' (2015) 81 Arbitration, Issue 2, Chartered Institute of Arbitrators

Abstract:

It could be said that every construction project is unique in that the basic variables of time, cost, quality and contractual risk allocation are never consistent from one project to the next, and it would be naïve to think that the causes of construction disputes could be removed by a cleverly worded contract. Add in the human element and you have a breeding ground for high levels of uncertainty, dispute and conflict. Disputes may not be avoidable in many circumstances, but there are now recognised ADR methods of dispute resolution available to the contracting parties. DABs standalone in that they are both dispute avoidance and resolution method, DBs have developed international quite successfully over the past fifty years in mature economies such as the US, UK, Australia and Western European countries. However, in the UAE the process has had limited success, and has not gained traction as a method of dispute resolution, with Employer's even removing the DAB related sub-clause from the standard FIDIC conditions. From my experience UAE Employer's and Contractor's still favour arbitration or litigation to resolve disputes, this dissertation will investigate why.

The primary aim of this dissertation is to identify if UAE construction professionals recognise that the current methods of dispute resolution employed under UAE construction contracts is no longer sufficient to meet the needs of the industry, and are alternatives such as DABs the answer. All parties to a construction contract want a dispute resolution process which could be considered fair, efficient in terms of time and cost and protects/maintains existing business relationships. It can be argued that DABs meet these criteria in that they act as a buffer by promoting dispute avoidance and management techniques, thus preventing disputes reaching more prolonged levels of resolution like arbitration or litigation.

This dissertation explores the benefits of DABs in the context of the UAE construction industry by reviewing international publications and data on the subject. In addition detailed opinion were sought from reputable construction professionals in the UAE and an on-line survey was conducted to get the representative opinion of the wider UAE construction industry on DABs as the potential primary method of construction dispute resolution. The dissertation also discussed why DABs are currently not being utilised in the UAE and what measures need to be adopted to overcome these obstacles. Education, training, promotion of the benefits of DABs, change in industry culture, alignment of Employer and Contractor perspectives and government participation (legislation) are need in order for DABs to become more prevalent in the UAE construction industry.

ملخص موجز:

يمكن القول بأن كل مشروعٍ إنشائيٍ فريدٌ في نوعه حيث أن تخصيص المتغييرات الأساسية كالوقت، والتكلفة، والجودة، والمخاطر الإنشائية لا تكون مطلقاً ثابتة من مشروعٍ لآخر، ويكون من السذاجة بمكان، التفكير في أن نزاعات الإنشاء من الممكن حلها بواسطة عقدٍ تتم صياغته بذكاء. بالإضافة إلى العنصر البشري، مع وجود بيئةٍ ملائمة لخلق مستوياتٍ عالية من الغموض، والنزاع والصراع. وقد يتعذَّر تجنب النزاعات في العديد من الظروف، إلاَّ أن هنالك أساليب بديلة (ADR) بأنها أسلوب لتجنب النزاعات وحلها، DABsلحل النزاعات متاحة الآن لأطراف التعاقد. وتتميز مجالس حل النزاعات ( ) بشكلٍ ناجحٍ دولياً خلال الخمسون عاماً الماضية في الاقتصاديات الناضجة DABsوقد تطورت مجالس حل النزاعات (مثل الولايات المتحدة، والمملكة المتحدة، وأستراليا، ودول غرب أوروبا. ومع ذلك، وفي أ.ع.م، فإن هذه العملية قد حققت نجاحاً محدوداً، ولم تحظى بالقبول كوسيلة لحل النزاعات، مع قيام جهات العمل بإزالة البند الفرعي الخاص بمجلس تحكيم النزاعات من الشروط النموذجية لعقود "فيديك". ومن خلال تجاربي، فإن جهات العمل والمقاولون في أ.ع.م، ما زالوا يفضلون التحكيم، أو التقاضي لحل النزاعات، وستعمل هذه الأطروحة على التحري عن السبب وراء ذلك.

إن الهدف الأساسي لهذه الأطروحة هو لتحديد ما إذا كان خبراء الإنشاءات في أ.ع.م قد أدركوا بأن الأساليب الحالية لحل النزاعات والتي يتم تطبيقها بموجب عقود الإنشاءات في أ.ع.م لم تعد كافية للإيفاء بمتطلبات الصناعة، وأن البدائل مثل) هي الحل. إن جميع أطراف أيِّ عقدٍ إنشائيٍ يرغبون في عملية حلٍ للنزاع يمكن إعتبارها منصفة، وفعالة من DABsالـ( ) DABsحيث الوقت والتكلفة مع حمايةٍ ومحافظةٍ على علاقة الأعمال الحالية. ويمكن القول بأن مجالس حل النزاعات (تتوافق مع هذه المعايير حيث أنها تعمل كمخفِّف للصدمات من خلال الترويج لتجنب النزاعات، مع توفير تقنياتٍ للإدارة، مما يعمل على الحد من وصول النزاعات إلى مستوياتٍ مطولة من الحلول كالتحكيم أو التقاضي.

) في سياق صناعة الإنشاءات في أ.ع.م من DABsوتعمل هذه الأطروحة على إستكشاف فوائد مجالس حل النزاعات (خلال القيام بمراجعة النشرات والبيانات الدولية بشأن الموضوع. بالإضافة إلى ذلك، تم السعي للحصول على آراءٍ تفصيليةٍ من مشاهير الخبراء في مجال الإنشاءات في أ.ع.م، مع القيام بإجراء إستبيانٍ مباشر على الإنترنت للحصول على) بإعتباره الأسلوب الأساسي DABsالرأي التمثيلي الأوسع في مجال صناعة الإنشاءات بشأن مجالس حل النزاعات ( ) حالياً في DABsالمحتمل لحل النزاعات. كما تقوم الأطروحة بمناقشة السبب وراء عدم إستخدام مجالس حل النزاعات (أ.ع.م، وما هي الإجراءات المطلوب إتخاذها للتغلب على هذه الصعوبات. إن التعليم، والتدريب، والترويج لفوائد مجالس) سيعمل على تغيير ثقافة الصناعة، إن تقارب وجهات نظر جهة العمل والمقاول، ومشاركة DABsحل النزاعات ( ) أكثر إنتشاراً داخل صناعة الإنشاءات DABsالحكومة (الجهات التشريعية) مطلوبة حتى تصبح مجالس حل النزاعات (في أ.ع.م.

Acknowledgments:

The author wishes to thank everybody who has contributed in many ways in allowing me to successfully complete the various aspects of this dissertation. I would like to express my sincere gratitude to all those who encouraged and supported me throughout the completion of this dissertation and for the two years whilst completing my MSc in Construction Law and Dispute Resolution.

The author extends appreciation to my supervisor Dr Abba Kalo, for all his invaluable advice and encouragement, all the people that participated in the online questionnaire survey, give time for interviews and helped proof read the dissertation.

Thank you to the library staff at The British University in Dubai for their assistance with this dissertation. Finally a special thanks to my wife Roma and son Iollan for their constant moral support and encouragement throughout the duration of my studies. To them I dedicate this work.

A. Table of Contents: Page Numbers:

B. List of Figures:

C. List of Interviewees

- **Adrian Cole, Partner King and Spalding**

Adrian is a construction law specialist advising on disputes relating to energy and infrastructure development in the Middle East. Prior to becoming a lawyer, he qualified as an engineer / quantity surveyor and has first-hand experience of the practical issues in the engineering and construction industries.

- **Andy Hewit, FICCP, FCIOB, FCInstCES, FQSi, ACIArb**

Andy is the author of the books *Construction Claims & Responses* and *The FIDIC Contracts*: *Obligations of the Parties*. Andy has over 40 years' experience in the construction industry which has been gained in the United Kingdom, Africa and in the Middle East, where he has been based for the past 18 years.

- **John Papworth Chartered Arbitrator, FRICS, FCIArb, FCInstCES, FACostE, FDBF, AFIChemE, Companion of the ICE**

John is a practicing Dispute Board Chairman and Member. He is on the FIDIC President's List of Adjudicators and on the DB Panels of the ICE, the Dispute Board Federation, the Dispute Resolution Board Foundation and the Engineering Professions Association of Namibia. His DB experience has been gained in the Middle East, Eastern Europe and East and Southern Africa over a period of ten years, having been appointed on 22 occasions.

- **Nicholas Gould, Partner Fenwick Elliott**

Nicholas is an expert in dispute resolution where his experience spans litigation, arbitration (domestic and international), adjudication, DAB/DRB, mediation, early neutral evaluation and expert determination. He regularly acts as a mediator in construction, engineering and commercial disputes, sits as adjudicator on international Dispute Adjudication Boards and as arbitrator, and is a registered legal practitioner, DIFC Court.

- **Michael Grose, Partner Clyde & Co.**

Michael reviews, advises on and prepares construction contracts for major projects, particularly the FIDIC suite of contract conditions. As a result, he has considerable experience of conducting arbitration in the Gulf, including as an arbitrator appointed by the Dubai International Arbitration Centre. He is the author of the first book on construction law in the Gulf, "*Construction Law in the United Arab Emirates and the Gulf*".

- **Royston Pendley, Legal Manager Al Naboodah Group Enterprises LLC**

Royston is responsible for the legal affairs of Al Naboodah Construction Group, which includes Civil, Buildings, MEP and Fit-out Contracting divisions. He has been in the UAE for over 15 years and has considerable experience in Arbitrations, Mediations and dispute resolution within the UAE construction industry.

D. Abbreviations

AAA – American Association of Arbitration

ADCCAC - Abu Dhabi Commercial, Conciliation and Arbitration Centre

ADR – Alternative Dispute Resolution

AED – Arab Emirates Dirham

BOQ – Bill of Quantities

CA – Court of Appeal

CASD – Centre for Amicable Settlement of Dispute

CDB – Combined Dispute Board

CEDR – Centre for Effective Dispute Resolution

CEO – Chief Executive Officer

CIArb – Chartered Institute of Arbitrators

CIOB – Chartered Institute of Builders

CPC – Civil Procedure Code

CPR – Civil Procedure Rules

CQS – Client Quantity Surveyor

CTC – Civil Transaction Code

DAB – Dispute Adjudication Board

DB – Dispute Board

DIAC – Dubai International Arbitration Centre

DIFC – Dubai International Financial Centre

DIFC-LCIA - Dubai International Financial Centre – London Centre for International Arbitration

DLC – Defect Liability Certificate

DRB – Dispute Review Board

DRBF – Dispute Resolution Board Foundation

DRE – Dispute Review Expert

EOT – Extension of Time

EPC – Engineering, Procurement and Construction

EU – European Union

FIDIC - Federation Internationale Des Ingenieurs-Conseils

GCC – Gulf Cooperation Council

GDP – Gross Domestic Product

GM – General Manager

HC – High Court

HGCRA – Housing Grant, Construction and Regeneration Act

HMSO – Her Majesty's Stationary Office

ICC – International Chamber of Commerce

IDAP – Independence Dispute Avoidance Panel

JCT – Joint Contracts Tribunal

JICA - Japan International Cooperation Agency

LD – Liquidated Damages

LCIA – London Court of International Arbitration

MDB – Multilateral Development Bank

ME – Middle East

MENA – Middle East and North Africa

NEC – New Engineering Contracts

NoD – Notice of Dissatisfaction

PMBOK – Project Management Body of Knowledge

PMI – Project Management Institute

QS – Quantity Surveyor

RICS – Royal Institute of Chartered Surveyors

SCT – Small Claims Tribunal

TCC – Technology and Construction Court

TOC – Taking Over Certificate

UAE – United Arab Emirates

UK – United Kingdom

UNCITRAL – United Nations Commission on International Trade Law

US – United States

USD – United States Dollar

CHAPTER ONE

Introduction

1.1. Introduction:

The construction industry is susceptible to disputes, for a number of various reasons. Firstly, almost all construction projects are unique, each new project throws up different challenges, this is because design, technology and construction techniques are continually evolving, and over the past twenty years this evolution has gathered significant pace. Few construction projects are built exactly as originally planned, there are a number of situations where claims can develop into disputes and conflict between the parties, e.g. variations to the original design, deviation from the programme, payment concerns and quality issues to name but a few.

The fundamentals of any construction contract revolves around time, cost[2], quality and risk allocation, any changes in these fundamentals may give rise to an entitlement of claim for additional payments, mainly through a variation, delay or disruption claim. The perspectives of both parties may be completely different as to what constitutes a valid claim under the contract, this intransient view is what leads to numerous construction disputes. The question as to who is at fault for causing the dispute is often complex technically, commercially and legally, which necessitates the intervention of an independent third party, because the dispute cannot be resolved amicably between the contracting parties. The role of the third party is to assess the merits of the dispute and render a decision as to which party may be at fault.

The parties to a construction contract generally spend insignificant periods of time negotiating the contractual mechanisms of the dispute resolution clauses. If and when disputes do arise they can become costly relatively quickly. But if both parties have an understanding of how the mechanisms of the contract work, the likelihood of disputes arising will be reduced. The process of dispute resolution in the construction industry has changed dramatically over the past forty years, the process has moved from contracting parties pursuing litigation to resolve disputes, then moving to arbitration as the most popular means of dispute resolution, to the current situation where ADR has come to the forefront of construction dispute resolution.

[2] "From my own experience in my ten most recent arbitrations the costs of the reference and award have varied from 2.58% to as much as 37% of the overall value of the amount in dispute, with an average of 12.75%". N G. Bunni, 'What has History Taught Us in ADR? Avoidance of Dispute!' (2015) 81 Arbitration, Issue 2, Chartered Institute of Arbitrators

The objective of this dissertation is to identify and investigate the possibility of adopting DABs on large to medium size projects in the UAE as method to avoid, manage and resolve construction disputes in a more cost effective and time efficient manner. Although DBs exist under various forms, in both bespoke and standard contracts, for the purpose of this dissertation the research will mainly focus on the FIDIC 1999 (Red Book) DAB provisions, mainly due to the fact FIDIC is the most common form of contract encountered in the UAE and wider ME construction industry.

In many jurisdictions around the world there are now several ADR methods available to contracting parties, which provide an alternative to arbitration and litigation, such methods are more time efficient and less costly. This leads to ask the obvious question as to why the UAE construction industry has not embraced these ADR methods, particularly where such methods have been proven to be successful in other jurisdictions. Is the UAE at risk of falling behind international best practice when it comes to construction dispute resolution, and would the introduction of DABs backed up by relevant statutory legislation be the answer?

Most construction dispute ultimately revolve around monitory issues, the Contractor's profit margin and the Employer's costs. When the financial position of either party is threatened there is a high potential for conflict and disputes to emerge. The reasons why disputes evolve will be discussed in Chapter 2, however, the main concerns of any party to a construction dispute, and the process of resolving the said dispute generally revolve around:

a) Cost,
b) Time taken to get an award/decision/judgement,
c) Interim relief (so as to maintain cash flow)
d) Enforcement of the award/decision/judgement.

1.2. Research Background:

Over the past 40 years the UAE has experienced unprecedented growth in its construction industry, the cyclical rise and fall in the UAE economy (which is driven by oil exports, and in recent years but to a lesser extent tourism) have mirrored the rise and fall in the fortunes of the UAE construction industry. The economic crisis of 2008 had a devastating impact on the global construction industry, and impacted the UAE particularly severely, during that period a number of major infrastructure projects such as the Dubai Metro, Burj Khalifa, Dubai and Abu Dhabi airport expansions were at various stages of completion. The sudden lack of liquidity in the market forced a number of major projects contracts to be terminated, suspended indefinitely or continued with a significantly reduced scope, all of which had an impact on cash flow and payments, which ultimately led to numerous construction contractual disputes. Some disputes from this period have taken years to resolve in arbitral tribunals and the UAE Courts, and cost USD millions in legal fees and lost time.

The UAE is again expecting huge growth in construction related activity in the run-up to hosting EXPO 2020 and a number of other major developments throughout the region. However, the sustained low oil prices since 2015 are impacting cash flow and liquidity within the UAE construction industry. "Across the region, many projects and programmes are facing a very different economic business case than when they were initially planned, this has resulted in a rise in the number of project deferrals and cancellations, which in turn has led to an increase in the volume of claims submitted and formal disputes that have materialised".[3]

The UAE construction industry is susceptible to external global economic shocks, mainly due to the open economic model adopted by the UAE, the AED peg to the USD, the number of international construction related companies operating in the UAE and the commodity market fluctuations in international oil prices. There may well be uncertain economic times ahead due to external risks and global geo-political tensions in Korea, Syria/Iraq, Ukraine and the impact of Brexit. However, the consensus is that the world economy is growing steadily, even considering all the current global issues. Global growth is expected to be 3.5% in 2017,

[3] Global Construction Disputes Report (2017) Avoiding the same Pitfalls Arcadis https://images.arcadis.com/media/2/4/B/%7B24BB2290-3108-4A38-B441-E3C0B95FB298%7DGlobal_Construction_Disputes-2017.pdf accessed 15 October 2017

and increase to 3.6% in 2018[4]. Advanced economies of the US, Europe, Japan and China are experiencing above average rates of GDP growth, due to historically low interest rates and recovery in global manufacturing and trade. The latest economic data for the UAE is also relatively positive[5]. However, any shocks to the global economy will have both a direct and indirect impact on the UAE economy and liquidity.

When there is a lack of cash flow and liquidity in the construction industry there will be disputes, because contractual claims will be rejected or ignored by Engineer's/Employer's, leaving the Contractor with no other option but to utilise the dispute resolution mechanisms available under their contracts. Such disputes can cause major disruptions to the Contractor's cash flow, problems surrounding this issue in the UK were highlighted by Lord Denning[6]. The UAE construction industry in 2017 is facing similar problems experienced in the UK in the 1990's prior to the introduction of the HGCRA[7], with regards negative cash flows. Currently, there is no effective dispute resolution mechanism in place in the UAE underpinned by legislation and the Courts which would provide 'interim relief' to the party suffering financially due to a prolonged dispute, based on the principle of 'pay now, argue later'. The impact of prolonged disputes can have a domino on cash flow through the supply chain from the Main Contractor, to Sub-Contractors and material suppliers, this also effects the wider UAE economy.

Therefore, there is currently a need in the UAE to ensure that robust dispute resolution mechanisms are put in place which are time and cost effective, provide some form of interim

[4] Monetary Fund World Economic Outlook (2017) https://www.imf.org/en/Publications/WEO/Issues/2017/09/19/world-economic-outlook-october-2017 accessed 28 October 2017

[5] International Construction Market Survey (2017) http://www.turnerandtownsend.com/media/2389/icms-survey-2017.pdf accessed 15 October 2017 Construction cost inflation was 3.7% globally in 2016 compared to 1.5% in the UAE, with a projection of 2% in 2017. The average cost per meter squared of construction in the UAE (Abu Dhabi and Dubai) was USD 1,725.7 this favourable compared to other major global cites, London cost USD 3,213.99, Hong Kong USD 3,487.82 and New York USD 3,806.92. Profit margins in the UAE were typically 8% with preliminary costs running at 11% of the contract value this compares favourably with average profit margins in Europe and Asia.
The International Monetary Fund Statistical Appendix (October 2017) https://www.imf.org/en/Publications/WEO/Issues/2017/09/19/world-economic-outlook-october-2017 accessed 14 October 2017 Found that UAE Real GDP growth is projected to be 3.4% in 2018 (average of 3.1% up to 2022). The Consumer Price Index (CPI) for the UAE is projected to be 2.9 in 2018 and the Current Account Balance will be 2.1% in 2018 (average 3.7% up to 2022).

[6] D Bowes, 'Practitioners Perception of Adjudication in UK Construction' (2007) Procs 23rd Annual ARCOM Conference cited Lord Denning "One of the greatest threats to cash flow is the incidence of disputes, resolving them by litigation is frequently lengthy and expensive, arbitration in the construction context is often as bad or worse".[6]

[7] English Housing Grants, Construction and Regeneration Act (1996)

relief and are enforceable in the UAE Courts. DABs are not new to the UAE or wider ME region, as the "most commonly used form of contract used in the region is the FIDIC Rainbow suite of contracts. However, DAB provisions have historically been deleted on many projects in the region,[8] nonetheless there have been moves by the Abu Dhabi Government to introduce DAB clauses in their standard contracts. Although, the DAB is ad-hoc which removes the benefit of dispute avoidance which a standing DAB provides, it is a move in the right direction and gives hope that other Employer's in the UAE construction industry will take note of.

DABs were conceived to overcome the deficiencies associated with Litigation and Arbitration proceedings as a method of resolving construction disputes. In the UAE for a variety of different reasons almost all construction contracts have arbitration as the default method of dispute resolution. Considering that in 2016 the average value of disputes in the ME were higher than the global average at USD 56 million, with the average length of disputes being 13.7 months[9], it is extraordinary that **t**he adoption of DABs as a method of dispute avoidance/resolution in the UAE has been lethargic to date. This is extraordinary considering the documented benefits of DABs internationally as a process of dispute avoidance/resolution, combined with the experience and intimate knowledge of the construction process the DAB members would bring to a project.[10] DABs can prevent disputes by:

- Promoting bilateral agreement,
- Facilitating positive relationships, open communications, trust and cooperation,
- Minimising inflated claims and posturing,
- Encouraging early identification, evaluation and prompt resolution of claims.

[8] Dispute Adjudication Boards, http://www.arabianindustry.com/construction/news/2014/dec/4/dispute-adjudication-boards-4894760/ accessed 05 September 2017

[9] Global Construction Disputes Report (2017) Avoiding the same Pitfalls Arcadis https://images.arcadis.com/media/2/4/B/%7B24BB2290-3108-4A38-B441-E3C0B95FB298%7DGlobal_Construction_Disputes-2017.pdf accessed 15 October 2017

[10] P Taplin and G Atherton, 'Will Hindsight Promote the Case for Dispute Adjudication Boards?' (2014) Adjudication Society Newsletter

1.3. Aims and Objectives:

The overall aim of this dissertation is to identify the potential utilisation of DABs in the UAE construction industry. The dissertation will also determine if construction professionals within the industry would prefer to move away from the tried and tested and some might say flawed methods of dispute resolution, such as arbitration and litigation, in favour of a dispute avoidance method such as DABs. The objectives of this research are:

Dissertation Objectives
• To discuss construction risks and the causes of construction disputes in the UAE.
• To examine and explain the functions of DABs.
• To investigate the DAB Sub-Clauses under FIDIC 1999 Red Book with particular focus on recent international court rulings with regards the enforcement of the DABs decision, and how this would apply in the UAE Courts.
• To identify if construction professionals in the UAE actually want DABs as a method of dispute avoidance/resolution.
• To ascertain why DABs are not utilised more in the UAE, and the reasons why.
• To discuss actions which can be taken in the UAE to make DABs a viable option for the contracting parties.

Figure 1.1. Dissertation Objectives

1.4. Scope of Study:

The scope of this dissertation is limited to the use of DABs in the UAE, based mainly on FIDIC 1999 with reference to international best practice. When parties enter into a construction contract, the may have varying aims, the primary objective of the Contractor is to generate profit and revenue, while the same would be true for the Employer, be they a developer or government entity[11]. Most Employer's and Contractor's operating in the UAE are experienced and understand the circumstances that generally lead to disputes on construction projects. However, the question this dissertation will attempt to answer is why DABs are not more commonly used in the UAE as a method of dispute avoidance and resolution, when this particular region could benefit most from them.

[11] Infrastructure projects to develop the economy are also based on revenue generation and increasing GDP.

Firstly, this research intends to investigate and illustrate if construction professionals operating in the UAE want to or would avail of DABs as a mechanism to resolve construction disputes. Secondly, the opinions of construction professionals with experience in the UAE construction industry, knowledge of the UAE legal system and DAB procedures and rules will be gathered through interviews. The selected group of interviewees will provide relevant background knowledge to examine if current UAE legislation allows the enforcement of DAB decisions in the UAE Courts, and could statutory legislation be introduced in the UAE to supplement the DABs decision to provide some form of interim relief to the claimant while the dispute is being resolved.

1.5. Research Methodology:

The research methodology adopted was both doctrinal and quantitative (refer to Chapter 3 Research Methodology), the reason these methodologies were chosen was to allow the author and subsequent readers of this body of work gain an understanding and insight into the particular subject matter, as to why DABs are not more widely used in the UAE. The purpose of this dissertation is to identify if construction professionals believe DABs are the best solution to dispute avoidance/resolution in the UAE construction industry, and can DABs provide a measure of interim relief and would the DABs decision be enforceable in the UAE Courts if necessary. The following research strategy was adopted:

Literature Review:

A review of current literature was undertaken on the subject of DABs, both primary and secondary literature sources were used as part of the research. Detailed analysis was undertaken of articles, books, journals, relevant web-sites and previous dissertations in the area of construction claims, dispute, ADR methods and DABs under FIDIC 1999 Red Book.

Semi-Structured Interviews:

Semi-Structured interviews were carried out with a number of leading UAE construction professionals so specific information could be obtained on the subject of DABs based on a phenomenological research approach. This form of interview allowed specific issues to be raised during the course of the interview, and give the interviewee greater freedom to express their view on the subject. The questions were sometimes replicated, where appropriate, with

each interview so as to allow analyses of the responses clearly. The transcripts of the interviews can be found under Appendix B.

Questionnaires:

Construction professionals in the UAE were invited to participate in an on-line survey questionnaire, the purpose of which was to gather data from a relatively large number of respondents including Sub-Contractor, Main Contractors, Employers, Consultants (Engineers & Architects) and lawyers. The aim of the Questionnaire is to determine if UAE construction professionals are aware of DABs and would they welcome them as a primary method of dispute resolution. A copy of the questionnaire can be found under Appendix C.

1.6. Structure of Dissertation:

Chapter One: Research Introduction

Chapter one acts as an introduction to the basic concepts of DABs and provides a roadmap detailing the scope of the study undertaken, including research background, aims and objectives, research methodology and structure of the dissertation. It also provides the reader with an insight into the research rationale and details the context as to why the author entered into the research study.

Chapter Two: Literature Review

Chapter two consists of an in-depth literature review focusing on a number of key areas, such as construction risk, claims and disputes, review of the FIDIC 1999 Clause 20 [*Claims, Disputes and Arbitration*], summary of the UAE legal system and current dispute resolution methods utilised in the UAE.

Chapter Three: Research Methodology

This chapter set out the methodology selected in this research work, it also details research methods, concerns, research limitations and question development.

Chapter Four: Survey Findings

Chapter four provides analysis and interpretation of the empirical data collected from the on-line questionnaire conducted for this study. The findings where possible have been enhanced with graphic interpretation and correlated with previous research identified in the literature review.

Chapter Five: Analysis Interpretation & Discussion

This chapter presents discussion, analysis and interpretation of information gathered during the literature review research and from the semi structured interviews. The chapter describes the participant group and outlines the analytical approach taken.

Chapter Six: Conclusion

This chapter draws conclusions arising from the analysis and findings of the study in response to each research objective, and presents recommendations as to the future of DABs in the UAE. This chapter also reviews options for further research, which could add to the existing body of knowledge.

CHAPTER TWO

Literature Review

2.1. Introduction:

The purpose of this literature review is to provide a summary for the reader of the core ideas and arguments which have been recently published relating to construction industry disputes and the advances in alternative dispute resolution/avoidance mechanisms, with a particular focus on DABs under the FIDIC 1999 (Red Book). An extensive literature search was carried out to identify all the major aspects of dispute boards, the research found there to be a consistent view from scholars and experts in the field with regards the advantages and disadvantages of dispute boards.

The structure of this literature review is as follows:

1. Describe a construction contract, identify risk allocation under the contract, how a claim becomes a dispute and dispute avoidance techniques.
2. The literature review will provide an overview of the history, rules and procedures of DABs and identify the most common methods of dispute resolution in the UAE.
3. Provide in-depth analyses of FIDIC 1999 Clause 20, and the criteria and responsibilities of the DAB members.
4. The review will conclude with a summary of dispute adjudication in the UAE.

The earliest record of conflict was the Book of Genesis[12], it can be said that "wherever there is human endeavour, there is conflict, a conflict of differing interests, of needs, of opinion or simply a conflict over a desired outcome to a prior agreement".[13] Nearly all construction/engineering projects will experience some form of dispute during the lifetime of the construction contract, the impact the dispute has on the parties in terms of cost, time and continued business relationships will depend on the parties' attitudes to resolving the dispute, and the methods of disputes resolution prescribed under the contract. "By and large construction projects are a breeding ground for disputes of all kind, they result from many

[12] "But the Lord came down to see the city and the Tower the people were building, the Lord said, if as one people speaking the same language they have begun to do this, then nothing they plan to do will be impossible for them, come let us go down and confuse their language so they will not understand each other". N G Bunni, 'What has History Taught us in ADR? Avoidance of Dispute' (2015) 81 Arbitration, Issue 2, Chartered Institute of Arbitrators

[13] Ibid

factors, including unfair allocation of risk, unrealistic expectations and schedules, poorly prepared contract documents, financial issues, poor communication and even the economy".[14]

In recent times the use of DABs have increased in conjunction with the continuing globalisation of adjudication, coupled with the increased use of DRBs, "which originally developed in the domestic US market".[15] While DABs are competing with other ADR methods outside the traditional dispute resolution mechanisms of arbitration and litigation, they do use a process of ADR based on adjudication, this is combined with the DAB member's knowledge of the construction industry. Therefore, the DAB can be more inquisitorial than an Arbitrator. The rapid rise to prominence of DABs over the past twenty years is due to the DABs ability to take early measure which would prevent potential disputes escalating. As a method of dispute resolution the process is proactive rather than reactive, and is the only method of ADR which is in place before the dispute even arises.

The UAE should be leading the way in ADR because of the significant volume of construction activity throughout the Emirates, the number of international contractors/suppliers operating in the market, the widespread use and familiarity with FIDIC forms of contract and the number of construction professionals from all around the world working within the UAE construction industry. Despite the UAE being a perceived progressive and developed construction industry, the number of construction related disputes continue to grow, as does the associated cost of such disputes. With this in mind, it is remarkable that the UAE construction industry has not embraced the idea of exploring more economical methods of dispute resolution that offers a relatively quick, cheap and less stressful alternative to the more traditional dispute resolution methods of arbitration and litigation.

The UAE construction market may very well consider itself a mature market with many experienced Employer's and Contractor's operating successfully in the sector. However, there is another side to the industry, one where Contractor's and Sub-Contractor's with less bargaining power do not have the opportunity to resolve their disputes with larger trading parties, due to onerous conditions of contracts and the exorbitant cost of arbitration and

[14] K Harmon, *American Arbitration Association Handbook on Construction Arbitration and ADR* (3rd edn, Juris, New York 2016)
[15] N Gould, 'Establishing Dispute Boards – Selecting, Nominating and Appointing Board Members' (2006) Society of Construction Law International Conference in Singapore

litigation proceedings. Currently, where there are major disputes under UAE construction contracts there is no specific method of providing Contractors and Sub-Contractors with some form of interim relief (summary judgement) during the actual construction phases, or where the dispute extends beyond the completion date. A fairer and more economically viable method of dispute resolution which could be acceptable to both parties and enforced in the UAE Courts is required in order to protect the financial interests and cash flows of the parties' contractual rights under the contract. Is now right time to introduce DABs into the UAE, and make DABs the standard rather than the exception?

2.2. The Construction Contract:

A construction contract is an "agreement between two or more parties which gives rise to rights and obligations which will be enforced according to the system of law applying to the contract".[16] Construction Contracts are more detailed and extensive when compared to other types of contracts, as was noted by Lord Diplock[17] and HHJ Newey[18], construction contracts were further defined under the HGCRA[19]. Under UAE Law contracts are defined under the UAE CTC Article 125[20], the source of law under all construction contracts in the UAE is governed under the CTC Article 1[21]. Islamic law has relevance to construction contracts with

[16] W Godwin, *International Construction Contracts A Handbook* (1st edn, Wiley-Blackwell, UK 2013)

[17] *Modern Engineering (Bristol) Ltd* v *Gilbert-Ash Northern* [1974] AC 689 "An entire contract for the sale of good and work and labour for a lump sum price payable by installments as the goods are delivered and the work done. Decisions have to be made from time to time about such essential matters as the making of variation orders, the expenditure of provisional sums and extension of time for the carrying out of the work under the contract". S Cheung, *Construction Dispute Research Conception, Avoidance and Resolution* (1st edn, Springer, Switzerland 2014)

[18] J Adriaanse, *Construction Contract Law* (2nd edn, Palgrave Macmillan, New York 2007) cited HHJ Newey "I think the most important background fact which I should keep in mind is that building construction is not like manufacture of goods in a factory. The size of the project, site conditions, the use of many materials and the employment of various kinds of operatives makes it virtually impossible to achieve the same degree of perfection the a manufacturer can, it must be rare that a new building in which every screw and every brush of paint is absolutely correct".

[19] Housing Grants, Construction and Regeneration Act (1996) The statutory definition of a construction contract includes "any agreement in writing, or evidenced in writing, under which the party does any of the following (i) carries out construction operations (ii) arranges for others to carry out construction operations (iii) provides labour for carrying out construction operations". J Murdoch and W Hughes, *Construction Contracts Law and Management* (4th edn, Taylor and Francis, London 2008)

[20] UAE Civil Transaction Code, Law # 5 of 1985, Article 125 "A contract is the coming together of an offer made by one of the contracting parties with the acceptance of the other, together with the agreement of them both in such a manner as to determine the effect thereof on the subject matter of the contract, and from which results an obligation upon each of them with regard to that which each is bound to do for the other".

[21] UAE Civil Transaction Code, Law # 5 of 1985, Article 1 "The legislative provisions shall apply to all matters dealt with by those provisions in the letter and in the spirit. There shall be no scope for innovative reasoning in the case of provisions of definitive import. If the judge finds no provision in this Law, he must pass judgment according to the Islamic shari'ah. Provided that he must have regard to the choice of the most appropriate solution from the schools of Imam Malik and Imam Ahmad bin Hanbal, and if none is found there, then from the schools of Imam al-Shafi'i and Imam Abu Hanifa as dictated by expediency".

regards the principles of Riba[22], Gharar[23], good faith[24] and due process[25]. UAE construction contracts are governed under the CTC Muqawala[26].

Under both common and civil law the legal concept of a contract is to "identify and apportion the rights and obligations of the parties, since these rights and obligations stem from the allocation of the risks to which the contract is exposed".[27] "The construction contract is unique in that it seeks to provide for a specific remedy in the event of any breach of the terms and conditions within its framework and/or for a contractual entitlement in respect of specified events or perceived risks".[28] The Conditions of Contract confer rights and obligations on the parties to the contract only (Privity of Contract)[29]. A typical construction contract will contain[30]:

- The Contractor's Tender
- The Employer's Letter of Acceptance
- The Contract Agreement
- The Conditions of Contract (General Conditions)
- Particular Conditions (which are adapted to take account of specific project requirements, e.g. local laws, physical condition of the site).
- The Technical Documents – (drawings, specifications and BoQ)

Some Employers have their own be-spoke contracts which are adopted to suit their specific requirements. The meaning of the words used by the parties under the written contract is

---

"If the judge does not find the solution there, then he must render judgment in accordance with custom, but provided that the custom is not in conflict with public order or morals, and if a custom is particular to a given emirate, then the effect of it will apply to that emirate".

[22] Illicit gain or unjustified enrichment

[23] An act of cheating, danger or unwariness "Gharar in transactions of sale causes the buyer to suffer a loss and is the result of lack of knowledge concerning either the price or the subject matter" N G. Bunni, *The FIDIC Forms of Contract* (3rd edn, Blackwell Publishing, Oxford 2005) cited Ibn Rushd.

[24] Good Faith applies to the conclusion, performance, termination, Riba and Gharar

[25] Both Parties should be heard by the Judge, unless the subject matter is forbidden by Shari'ah

[26] UAE Civil Transaction Code, Law # 5 of 1985 Contracts of Work, Part 1 – Muqawala (contract to make a thing or perform a task) Articles 872 to 896.

[27] N G. Bunni, 'A Comparative Analysis of the Claim & Dispute Resolution Provisions of FIDIC's 1999 Major Forms of Contract Against its Earlier Forms' (2006)

[28] Ibid

[29] "The common law rule of privity is that a contract cannot be enforced by or against a person who is not party to the contract". J Uff, *Construction Law* (11 edn, Sweet and Maxwell, London, 2013). Privity of contract is enshrined under the UAE Civil Transaction Code, Law # 5 of 1985, Article 250 and 252.

[30] B W Totterdill, *FIDIC Users' Guide a Practical Guide to the 1999 Red Book* (1st edn, Thomas Telford, London 2001)

interpreted by the Court in a process called constructing the contract[31]. Nonetheless, all contracts need to embody "good project planning, from feasibility through to construction and operation, and should provide for timely design, programming and risk management input from specialist supply chain members".[32]

2.3. Risk Allocation and Management:

There are a number of risks specific to construction contracts which may arise from the planning, design and tendering stage through to the actual construction, final completion and handover. Most construction contracts will define the allocation of risk between the Employer and Contractor based on the applicable law, and will have procedures and mechanisms to deal with any disputes that arise during the course of the project[33]. A well drafted construction contract should "allocate the risk of loss or damage occurring to the project clearly and completely, so that each party knows precisely which risks he bears and what the consequences are should a risk eventuate".[34] The performance or non-performance of obligations under the contract is generally the root of all contractual disputes, because one party believes that the other party is not performing their obligation under the contract. "It follows that the parties must have a very clear understanding of what they are undertaking".[35]

Risk can be defined as "hazard, danger, chance of loss or injury, or the degree of probability of loss"[36] and expressed as a mathematical equation[37]. Risk allocation must be determined by the contracting parties, in order to identify which party can best foresee, control or bear the risk and who would benefit or suffer more if the risk materialises, the philosophy of risk

[31] The construction of the contract is the "interpretation by which the meaning of the contract is ascertained, the construction of a commercial contract has nothing to do with the formation, or bringing about of the contract, it is solely concerned with ascertaining the meaning of the contract entered into by the parties". P S Davis, *JC Smiths The Law of Contract* (1st edn, Oxford University Press, Oxford 2016)
[32] Global Construction Disputes Report (2017) Avoiding the same Pitfalls Arcadis https://images.arcadis.com/media/2/4/B/%7B24BB2290-3108-4A38-B441-E3C0B95FB298%7DGlobal_Construction_Disputes-2017.pdf accessed 15 October 2017
[33] "In general the Contractor accepts all the risks that are not specifically allocated to the Employer, the Employer's liabilities include what are known as special risks" which are set-out under Clause 17.3 [Employer's Risks]
[34] W Godwin, *International Construction Contracts A Handbook* (1st edn, Wiley-Blackwell, UK 2013)
[35] J Murdoch, R Chapman and W Hughes, *Construction Contracts Law and Management* (5th edn, Routledge, London 2015)
[36] J Murdoch and W Hughes, *Construction Contracts Law and Management* (4th edn, Taylor and Francis, London 2008)
[37] Risk = Probability or frequency of the occurrence of a defined event multiplied by the Consequences of the occurrence of that event.

allocation was summarised by Grove[38]. There are two types of risks to consider in a construction contract, the first are risks which lead to damage, injury or physical loss, which are insurable, and the second type are risks which could lead to delay in completion, cost overruns or non-performance of the contract, which are uninsurable risks. For large international construction projects risk can be separated into project delivery and jurisdictional risk[39].

"The FIDIC General Conditions allocate the risk between the parties on a fair and equitable basis, taking account of such matters as insurability, sound principles of project management, and each party's ability to foresee and mitigate the effect of the circumstances relevant to each risk".[40] The concept of foreseeability is defined under FIDIC 1999[41] however, the Contractor is liable for the consequences of all risks not expressly allocated to the Employer under the contract, refer to Sub-Clause 17.1[42]. Under FIDIC 1999 Sub-Clause 17.6[43] the scope and the extent of the parties' liabilities to each other are outlined.

The process of managing contractual risk was identified by PMBOK[44], risk can be broken into Risk Analysis (risk identification[45] and quantification[46]) and Risk Management (response

[38] N G. Bunni, *The FIDIC Forms of Contract* (3rd edn, Blackwell Publishing, Oxford 2005) cited J B. Grove "The ultimate goal of optimal risk allocation is to promote project implementation on time and on budget without sacrifice in quality, that is, to obtain the greatest value for money, the goal for a repeat employer should be to minimise the total cost of risk on a project, not necessarily the cost of either party".

[39] "Project delivery risks are that which relate to the delivery of a specific project and to the financing and construction of a specific asset, and can include counter-party risk, site and ground condition, construction contract risk, availability of financing and bankability of a project, materials price escalation risks". "Jurisdiction risks relate more generally to the jurisdiction within which the project is to be delivered and the asset constructed. Jurisdictional risks include things like legal entity establishment and licensing procedures, political and social stability, exchange rate risk, currency controls, availability of dispute resolution forums and enforcement issues, to name a few". S Kerur and W Marshall, 'Identifying and Managing Risk in International Construction Projects' (2012) International Review of Law 2012, 1, 08

[40] G Owen, 'The Working of the Dispute Board (DAB) Under New FIDIC 1999 Red Book', (2003)

[41] FIDIC 1999 Red Book Sub-Clause 1.1.6.8 [*Unforeseeable*] "means not reasonably foreseeable by an experienced contractor by the date for submission of the Tender". Subject to an express term to the contrary, risks that are foreseeable are borne by the Contractor and in contrast those that are not foreseeable are borne by the Employer. E Sunna, 'FIDIC 1999 Red Book - A Practical Overview' (2007) Law Update 2007, 192, 26

[42] FIDIC 1999 Red Book Sub-Clause 17.1 [*Indemnities*]

[43] FIDIC 1999 Red Book Sub-Clause 17.6 [*Limitation of Liability*] "Neither Party shall be liable to the other Party for loss of use of any Works, loss of profit, loss of any contract or for any indirect or consequential loss or damage which may be suffered by the other party in connection with the Contract, other than under Sub-Clause 16.4 and Sub-Clause 17.1".

[44] PMBOK – A Guide to the Project Management Body of Knowledge (2013)

[45] Risk identification methods include checklists, cost estimates, labour/staffing and procurement plans, brainstorming and the development of a risk register.

[46] Risk can be quantified using a number of methods, expected monetary value (EMV=Probability% by Impact (AED)), triangulation method, sensitivity analysis, Tornado charts or more developed computer systems such as Monte Carlo simulation or the Central Limit Theorem.

development[47] and response control[48]), risk was also defined by PMI[49]. Risk identification and assessment is not a science but an art, the allocation of risk will depend on the procurement strategy of the Employer and experience of the Contractor. Equitable risk[50] and efficient contracts are "considered to be the gateways to dispute avoidance, allocation of risk in construction projects should conform to accepted principles".[51]

The inappropriate allocation of risk creates more disputes when the parties are of unequal bargaining power. But "if the parties are of equal bargaining power there is nothing inherently unfair with any determined allocation of risk, so long as the parties are fully aware of the facts".[52] UAE Employer's such as the Abu Dhabi and Dubai Governments often heavily amend the standard FIDIC position allocating additional risk onto the Contractor[53].

2.4. Contractual Claims:

A claim can be defined as "an assertion of a right or remedy" it is therefore important that the parties to the contract understand the remedies available to them. Surprisingly, there is no specific definition of a 'claim' in any of the FIDIC Forms of Contract[54]. "A claim under a construction contract in practice is generally taken to be an assertion for additional payment

[47] The type of response to risk depends on the parties experience, the general principles of risk response are to accept (manage the risk), avoid or mitigate (transfer the risk through insurance) the risk. A party can only respond to a contractual or commercial risk if they have developed a risk management plan.
[48] The risk management plan allows the risk to be monitored and controlled (passive or active control). Most large construction projects will have a risk calendar, which will incorporate review dates, risk trigger points and identify periods when the risk may materialise.
[49] "The systematic process of identifying, analysing and responding to project risk, it includes maximising the probability and consequences of positive events, and minimising the probability and consequences of event adverse to project objectives". . M S. Bassiony, A El-Karim, A El Nawawy and A M Abdel-Alim, 'Identification and assessment of risk factors affecting construction projects' (2014) HBRC Journal Volume 13, Issue 2, 2017
[50] "Equitable risk allocation is a process where the risk is allocated to the party best able to control and manage the risk, equitable risk allocation has been identified as one of the strategies that would reduce the incidences of claims and disputes". P Fenn, *Commercial Conflict Management and Dispute Resolution* (1st edn, Spon Press, Oxon 2012)
[51] S Cheung, *Construction Dispute Research Conception, Avoidance and Resolution* (1st edn, Springer, Switzerland 2014)
[52] P Hibberd and P Newman, *ADR and Adjudication in Construction Disputes* (1st edn, Blackwell Science, Oxford 1999)
[53] "It is common for a contractor to have more onerous claim notification provisions, more restrictive suspension and termination rights, entitlement to certain time-related costs removed and a greater risk of unforeseeable site conditions and errors in design documents". M Kerr, D Ryburn, B McLaren and Z Or Dentons, 'Construction and Projects in the United Arab Emirates: Overview' (2014) Practice Law, Multi-Jurisdictional Guide 2013/14
[54] Under FIDIC 1999 Red Book the word 'claim' appears under Sub-Clause 2.5 [*Employer's Claim*] and Sub-Clause 20.1 [*Contractor's Claim*].

due to a party (variations, delay or disruption) or for extension of the time for completion".[55] Even if the conditions of the contract do not specify entitlement to a 'claim' the parties can still exercise their rights under the applicable law (tort/delict). Construction contract claims can be made based on the principle of quantum meruit[56] and claims for ex gratia[57] payment. Claims generally arise under the contract due to the following reasons:

a) Entitlement to EOT
b) Entitlement to additional payments
c) Entitlements to recovery of costs
d) Non fulfilment by one party of an obligation under the contract
e) Additional payments due to legal entitlement

FIDIC 1999 provides for both Employer Claims[58] and Contractor Claims[59]. If the Contractor considers himself entitled to EOT or additional payment[60] under any Clause of the Conditions of Contract they must give notice to the Engineer within 28 days, otherwise the Employer may be discharged from all liability[61] (the Contractor must also give notice of any probable future events that may adversely affect the work[62]). Submitting the claim within the 28 day

[55] N G. Bunni, 'A Comparative Analysis of the Claim & Dispute Resolution Provisions of FIDIC's 1999 Major Forms of Contract Against its Earlier Forms' (2006)
[56] "Where no price is stated for work carried out within an existing contract, the employer will be obliged to pay a reasonable sum". J Uff, *Construction Law* (11th edn, Sweet & Maxwell, London 2015)
[57] "Ex gratia payment are not claims which arise by virtue of a contractual entitlement, they are sometimes entertained by employers and engineers as a matter of expedience to avoid arbitration or litigation and, indeed, to maintain the goodwill necessary to complete the project successfully". N G. Bunni, *The FIDIC Forms of Contract* (3rd edn, Blackwell Publishing, Oxford 2005)
[58] FIDIC 1999 Red Book Sub-Clause 2.5 [*Employer's Claims*] "If the Employer considers himself to be entitled to any payment under and Clause of these Conditions or otherwise in connection with the Contract, and/or to any extension to the Defects Notification Period, the Employer or the Engineer shall give notice and particulars to the Contractor".
[59] FIDIC 1999 Red Book Sub-Clause 20.1 [*Contractor's Claims*]
[60] Under FIDIC 1999 Sub-Clause 14.3 [*Application for Interim Payment Certificates*] if the DAB awards the Contractor a sum of money, they would be entitled to include it in the interim payment application "The Statement shall include the following items, as applicable, which shall be expressed in the various currencies in which the Contract Price is payable, in the sequence listed: (f) any other additions or deduction which may have become due under the Contract or otherwise, including those under Clause 20 [Claims, Disputes and Arbitration]". If the Employer fails to include payment in the relevant interim payment cert, the contractor could invoke Sub-Clause 16.1 [*Contractor's entitlement to Suspend Work*] or 16.2 [*Termination by Contractor*].
[61] FIDIC 1999 Red Book Sub-Clause 20.1 [*Contractor's Claims*] "If the Contractor fails to give notice of a claim within such period of 28 days, the Time for Completion shall not be extended, the Contractor shall not be entitled to additional payment, and the Employer shall be discharged from al liability in connection with the claim".
[62] FIDIC 1999 Red Book Sub-Clause 8.3 [*Programme*] "The Contractor shall promptly give notice to the Engineer of specific probable future events or circumstances which may adversely affect the work, increase the Contract Price or delay the execution of the Work".

time bar is condition precedent to the recovery of time or money, and it is unlikely that the DAB or any subsequent arbitral tribunal would move away from this contractual provision[63].

However, there are some arguments against the time bar under the UAE CTC Articles 246[64] or 318[65]. "The general point being that it is wrong that a party who has genuinely suffered a loss might be prevented from bringing a claim in respect of that loss for a technical procedural breach".[66] It should be noted that the UAE civil codes also contain a provision confirming the importance of what has actually been agreed between the parties, refer to Article 243[67] and 265[68]. There may be other ways around Sub-Clause 20.1 condition precedent, refer to *City Inn Ltd*[69]

The Contractor must submit a detailed claim within 42 days of becoming aware of the event giving rise to the claim. The Employer must also substantiate his claim by specifying the Clause/Clauses or basis of the claim, there is no time limit specified under the Sub-Clause 2.5[70]. In both cases the Engineer under Sub-Clause 3.5[71] will determine the Employer's

[63] Under English law for a notice to amount to a condition precedent it must use very clear words, "it must set out the time for service and make it clear that failure to serve will result in a loss of rights under the contract". N Gould, 'Enforcing a Dispute Board's Decision: Issues and Considerations (2013)

[64] UAE Civil Transaction Code, Law # 5 of 1985, Article 246 Under UAE law "the requirement to act in good faith plays an important role in ensuring that contracting parties administer their contracts properly and fairly and in a way that the contracting parties had envisaged (perhaps by reference to custom or the parties' previous business dealings)". S Hunt, 'Good Faith' (2009) *DIFC* Law Update 2009, 221, 20

[65] UAE Civil Transaction Code, Law # 5 of 1985, Article 318 "No person may take the property of another without lawful cause, and if he takes it he must return it".

[66] J Glover, 'Sub-Clause 20.1 – the FIDIC Time Bar under Common and Civil Law' (2015) https://www.fenwickelliott.com/research-insight/articles-papers/contract-issues/sub-clause-fidic-time-bar accessed 31 October 2017

[67] UAE Civil Transaction Code, Law # 5 of 1985, Article 243 (2) "With regards to the rights (obligations) arising out of the contract, each of the contracting parties must perform that which he is obliged to do under the contract".

[68] UAE Civil Transaction Code, Law # 5 of 1985, Article 265 (1) "If the wording of a contract is clear, it is not to be departed from by way of interpretation to ascertain the intention of the parties".

[69] *City Inn Ltd* v *Shepherd Construction Ltd* [2003] S.L.T. 885 The dispute was whether or not the Contractor was entitled to an EOT and if the Employer was entitled to deduct LADs. The contract contained a time bar clause, requiring the Contractor to provide details of the estimated effect of an instruction within ten days. Lord Drummond Young characterised the clause thus: "I am of opinion that the pursuers' right to invoke clause 13.8 is properly characterized as immunity; the defenders have a power to use that clause to claim an extension of time, and the pursuers have immunity against that power if the defendants do not fulfill the requirements of the clause." The Engineer has the right to wave contractual procedural requirements, if the Engineer rejects the Contractors claim due to a time bar clause they must make reference to the condition precedent as a reason for the rejection.

[70] FIDIC 1999 Red Book Sub-Clause 2.5 [*Employer's Claims*] "The notice shall be given as soon as practicable after the Employer becomes aware of the event or circumstances giving rise to the claim".

[71] FIDIC 1999 Red Book Sub-Clause 3.5 [*Determinations*]

Claim[72] and Contractor's Claim[73] within 42 days of receiving the full supporting particulars of the claim.

Many times when one party submits a claim the other party will submit a counterclaim, the legal basis for a counterclaim is that it is an independent action, but must be similar to that of the claim, meaning the events and facts must be the same. A counterclaim could be defined as "an assertion made by a party, which can conveniently be examined and disposed of in an action originally initiated by the other party".[74]

2.5. Conflict Avoidance:

Conflict avoidance should be based on the old saying that "prevention is better than cure", if the parties can manage and resolve conflict before a formal dispute develops, this may lead to an improved project performance while maintaining the parties relationship. All projects require proactive conflict avoidance techniques, based on a clear and concise planning strategy for the execution of the works. Gould[75] identified a number of steps to be taken in order to attempt to avoid conflict:

1. Proactive planning and management
2. Clear contract documents
3. Good project management
4. Good client management
5. Partnering and alliancing
6. Good design team management
7. Record keeping

[72] FIDIC 1999 Red Book Sub-Clause 2.5 [*Employer's Claims*] "The Engineer shall then proceed in accordance with Sub-Clause 3.5 [*Determinations*] to agree or determine (i) the amount (if any) which the Employer is entitled to be paid by the Contractor, and/or (ii) the extension (if any) of the Defects Notification Period in accordance with Sub-Clause 11.3 [*Extension of Defects Notification Period*]".
[73] FIDIC 1999 Red Book Sub-Clause 20.1 [*Employer's Claims*] "The Engineer shall then proceed in accordance with Sub-Clause 3.5 [*Determinations*] to agree or determine (i) the extension (if any) of the Time for Completion (before or after its expiry) in accordance with Sub-Clause 8.4 [*Extension of Time for Completion*], and/or (ii) the additional payment (if any) to which the Contractor is entitled under the Contract".
[74] N G. Bunni, 'A Comparative Analysis of the Claim & Dispute Resolution Provisions of FIDIC's 1999 Major Forms of Contract Against its Earlier Forms' (2006)
[75] N Gould, 'Conflict Avoidance and Dispute Resolution' (2012) RICS Professional Guidance UK GN 91/2012

It is important to distinguish between conflicts, claims and disputes, "conflicts occur when objects are incompatible and on the other hand disputes arise when a conflict becomes an altercation".[76] If there is no claim by either party there can be no rejection or determination, which ultimately means there is no dispute, although there may be disagreement of opinions between the parties as to what constitutes a valid claim. "Dispute avoidance can only be used if both parties wish it to take place whereas dispute resolution can be initiated by one party alone once a dispute arises".[77] So when does a claim become a dispute? Judge Jackson J gave his assessment in *Amec Civil Engineering*[78]. "A claim is no more than an assertion and cannot become a dispute until there is a genuinely disputable issue",[79] refer to *Fastrack Contractors*[80], *Gleeson Group*[81] and *Halki Shipping*[82]. "

2.6. Contractual Disputes:

The drafting of a good contract alone will not result in the avoidance of construction disputes, as was highlighted by Lord Donaldson[83]. A dispute is defined as a "situation where two parties typically differ in the assertion of a contractual right, resulting in a decision being

[76] J Murdoch and W Hughes, *Construction Contracts Law and Management* (4th edn, Taylor and Francis, London 2008)

[77] N G. Bunni, 'A Comparative Analysis of the Claim & Dispute Resolution Provisions of FIDIC's 1999 Major Forms of Contract Against its Earlier Forms' (2006)

[78] *Amec Civil Engineering Ltd* v *Secretary of State for Transport* [2004] EWHC 2339 (TCC) "The mere fact that one party notifies the other party of a claim does not automatically and immediately give rise to a dispute, it is clear, both a s a matter of language and from judicial decisions, that a dispute does not arise unless and until it emerges that the claim is not admitted".

[79] P Hibberd and P Newman, *ADR and Adjudication* (1st edn, Blackwell Science, Oxford 1999)

[80] *Fastrack Contractors Ltd* v *Morrison Construction Ltd* [2000] BLR 168 "The Employer argued that there was no dispute to refer to adjudication on the basis that there were significant differences between the sums in the interim application and the notice to adjudicate, and the discrepancies meant that there was no dispute about the figures in the notice to adjudicate and hence no jurisdiction". http://www.adjudication.co.uk/archive/view/case/76/fastrack_contractors_ltd_v_morrison_construction_ltd_%5B2000%5D_blr_168 accessed 28 October 2017

[81] *M.J. Gleeson Group* v *Wyatt Snetterton* [1994] 72 BLR 15 (CA) "The Court held that the word 'dispute' in clause must be given its ordinary meaning which prima facie comprehends the case where a claim has been put forward and rejected".

[82] *Halki Shipping Corporation* v *Sopex Oils Limited* [1997] 3 All ER 833 "The Plaintiff asked the critical question is what is meant by ″dispute″, relying on the decision of the House of Lords in *Nova* v. *Kammgarn* **[**1977] 1 WLR 713, a ″dispute″ means a genuine or real dispute, and that a claim which is indisputable because there is no arguable defence does not create a dispute at all". "The Defendant argued that ″dispute″ means any disputed claim, and therefore covers any claim which is not admitted as due and payable, based on the Court rulings in *Ellerine* v *Klinger* [1982] 1 WLR 1375". http://www.nadr.co.uk/articles/published/ZzzzarbitrationLawReports/Halki%20v%20Sopex%201997.pdf accessed 22 October 2017

[83] C Chern, *Chern on Dispute Boards Practice and Procedures* (3rd edn, Routledge, New York 2015) cited Lord Donaldson "It may be that as a judge I have distorted view of some aspects of life, but I cannot imagine a civil engineer contract, particularly one of any size, which does not give rise to some dispute. This is not to the discredit of either party to the contract. It is simply the nature of the beast, what is to their discredit is that they fail to resolve these disputes as quickly, economically and sensibly as possible".

given under the contract, which in turn becomes a formal dispute".[84] A dispute resolution clause will "set out the procedures to settle disagreements that arise out of the contract, and also provide a gap fulfilling function to deal with unanticipated happenings".[85] If the construction contract is well drafted, and contain terms and conditions which are clear and unambiguous, such terms should address the most foreseeable situations, "but cannot cover all possible issues that may arise during the life of a project".[86]

All construction disputes must be weighed in terms of time and cost, and also take account of other factors such as business and personal relationships, the legal jurisdiction, obtaining a binding decision, enforcement and measures of interim relief. If a dispute significantly impacts the fundamental objectives of the project such as time, cost or quality it will undoubtedly erode the chances of project success. When a dispute arises the first question asked is, who is to blame?[87] It is therefore important to have a robust dispute resolution mechanism available to both parties under the contract. Whenever there are disputes the parties will refer back to the expressed terms of the contract, dispute resolution decisions will depend on the facts and the expressed terms, and to a lesser extent the implied terms and law. The main causes of construction disputes are:[88]

- Failure to properly administer or poor understanding of the contract
- Unfair allocation of risk
- Contracts do not fit the procurement route chosen
- Poorly drafted or incomplete and unsubstantiated claims
- Parties failing to understand or comply with its contractual obligations

---

[84] Global Construction Disputes Report (2017) Avoiding the same Pitfalls Arcadis https://images.arcadis.com/media/2/4/B/%7B24BB2290-3108-4A38-B441-E3C0B95FB298%7DGlobal_Construction_Disputes-2017.pdf accessed 15 October 2017

[85] S Cheung, *Construction Dispute Research Conception, Avoidance and Resolution* (1st edn, Springer, Switzerland 2014)

[86] L Picard, *American Arbitration Association Handbook on Construction Arbitration and ADR* (3rd edn, Juris, New York 2016)

[87] The likelihood of having serious construction disputes on a project can be predicted long before they occur, The CII developed a model dispute potential index which identified construction dispute predictors. "(i) Owner's management and organisation (ii) Contractor's management and organisation (iii) Project complexity (iv) Project size (v) Financial planning (vi) Project scope definition (vii) Risk allocation (viii) Contract obligations." SD-101 - DPI - Dispute Potential Index: A Study into the Predictability of Contract Disputes https://www.construction-institute.org/resources/knowledgebase/knowledge-areas/disputes-prevention-resolution-(best-practice)/topics/rt-023/pubs/sd-101 accessed 30 September 2017

[88] Global Construction Disputes Report (2017) Avoiding the same Pitfalls Arcadis https://images.arcadis.com/media/2/4/B/%7B24BB2290-3108-4A38-B441-E3C0B95FB298%7DGlobal_Construction_Disputes-2017.pdf accessed 15 October 2017

- Errors or omissions in the contract documents
- Incomplete design information or employer requirements
- Pressure on available funding
- Over ambitious allocation of risk to one party or through the supply chain.

Most construction disputes cannot be foreseen when the parties enter into contract, "but the gravity of the dispute can be diluted by following ethical practices and by performing business in an unemotional and above-board manner".[89]

2.7. Methods of Dispute Resolution:

Dispute resolution can be divided into final determination procedures such as arbitration and litigation, and preliminary determination procedures such as Mediation / Conciliation, Early Neutral Evaluation, Adjudication and Dispute Boards / Panels. The disadvantage of dispute resolution is that it occurs after the dispute has arisen, and has already likely impacted the project costs, cash flow and programme, possibly resulting in a deterioration of the relationship between the parties. Professor Green[90] has labelled the three pillars of dispute resolution as negotiation, mediation/conciliation and an adjudicative process, all dispute resolution processes are built on these pillars. The UAE construction industry has only embraced a limited number of dispute resolution mechanisms, which is limited to negotiation (Majlis), arbitration or litigation.

Direct negotiation between the parties is still the most efficient method of dispute resolution adopted in the UAE[91]. Construction disputes are almost always negotiated before the parties refer to the dispute resolution mechanisms under the contract. "Negotiation is a voluntary process that can occur at any time after the dispute has arises, negotiations take place without

[89] C Khekale and N Futane, 'Management of Claims and Dispute in Construction Industry' (2013) International Journal of Science and Research

[90] N Gould, P Capper, G Dixon and M Cohen, *Dispute Resolution in the Construction Industry An Evaluation of British Practice* (1st edn, Thomas Telford Publishing, London, 1999)

[91] "The Middle East, with its history of resolving disputes in the Majalis, is well suited for negotiation at senior executive level as a form of ADR". R Bell, 'United Arab Emirates: Dispute Resolution In Abu Dhabi Part 1 - Litigation Is Not The Only Way' (2011) http://www.mondaq.com/x/151798/Arbitration+Dispute+Resolution/Dispute+Resolution+In+Abu+Dhabi+Part+1+Litigation+Is+Not+The+Only+Way accessed 29 November 2017

the assistance of third parties".[92] The art of negotiation is the least expensive and time consuming method of dispute resolution available, but both parties have to find common ground so as to maintain their business and personal relationships. There are three principle negotiating strategies, positional[93], principled[94] and pragmatic, "using negotiation as a way to communicate for the purpose of persuasion is the pre-eminent mode of dispute resolution".[95] Only when negotiations breakdown are other dispute resolution procedures considered.

2.7.1. ADR:

ADR can be defined as "a broad spectrum of structured processes, including mediation and conciliation, which does not include litigation though it may be linked to or integrated with litigation, and which involves the assistance of a neutral third party, which empowers parties to resolve their own disputes".[96] The parties should agree to the amicable method of dispute resolution (including the rules of the prescribed method) at the time of drafting the contract, the success of the dispute resolution chosen will ultimately depend on the trust and good faith of the parties.

ADR methods are generally less successful when emotions are high and the parties are not interested in settling the dispute promptly. "Modern standard forms encourage the parties to resolve their disputes amicably, i.e. without adjudication, arbitration or litigation, this encouragement takes place in form of explicit reference to various modes of ADR and, in some cases, to particular ADR procedures".[97] The UK Courts actively support ADR as a

[92] C Y Enhada, C Turnage Gatlin and F Wilshusen, *Fundamentals of Construction Law* (1st edn, ABA Book Publishing, New York 2003)
[93] "Each side views the object of the negotiation as something finite that must be shared, stake out the position they believe is in their own interest, and concentrate on winning that position for their side, this makes the process an adversarial, competitive one". A Bogardus, *PHR / SPHR Professional in Human Resources Certification Study Guide* (2nd edn, Wiley Publishing, Indiana 2007)
[94] "Is a settlement that will satisfy both sides' interests by keeping a clear sight on one's best alternative to a negotiated agreement and on options for mutual gain". The key principles are (i) Separate the people from the problem (ii) Focus on interests, not positions (iii) Invent options for mutual gain (iv) Insist on objective criteria. K Mackie, D Miles, W March and T Allen, *The ADR Practice Guide Commercial Dispute Resolution* (3rd edn, Tottel Publishing, UK 2007)
[95] N Gould, 'Conflict Avoidance and Dispute Resolution' (2012) RICS Professional Guidance UK GN 91/2012
[96] Alternative Dispute Resolution: Mediation and Conciliation (Law Reform Commission Ireland, 2010)
[97] J Murdoch and W Hughes, *Construction Contracts Law and Management* (4th edn, Taylor and Francis, London 2008)

method to resolve construction disputes, refer to *Dunnett*[98]. The advantages of ADR are widely accepted within the construction industry,

- Speed / Cost – not the same level of involvement of lawyers and experts, also the costs of arbitrators and the use of Arbitration Institutions can be avoided.
- Consensual Process – as ADR is a flexible process that facilitated settlement which is confidential and without prejudice[99], and removes the parties risk of being bound by a decision of a third party (the process can be binding on the parties by providing a form of wording).
- Neutrality and Fairness
- Preservation of Relationships
- Confidential
- The enforceability of ADR clauses was addressed in *Hopper Bailie*[100] and the endorsements of ADR confirmed by the English courts in *Channel Tunnel,*[101] in that the English Courts are in favour of letting the parties resolve their dispute in the manner prescribed under their Contract.

[98] *Dunnett* v *Railtrack* [2002] 2 ALL ER 850 "The Court of Appeal refused to make an order as to the costs with reasoning that the defendant (who had won the case) had refused to contemplate ADR at a stage before the costs of this appeal started to flow, hence the winning party could not recover costs". J Murdoch, R Chapman and W Hughes, *Construction Contracts Law and Management* (5th edn, Routledge, London 2015)

[99] "Discussions or documents submitted during the mediation process cannot be used against the party who made or produced them in subsequent proceedings". A Powell, 'Mediation in the UAE' (2012) Law Update 2012, 248, 1

[100] *Hopper Bailie Associated Ltd* v *Natcon Group Pty Ltd* [1992] 28 NSWCR 194 "The Plaintiff sought a stay on arbitration proceedings until conciliation had concluded, there was an implied term in the conciliation agreement that the parties would take all reasonable steps to resolve the issue". The Court held that the arbitration proceedings would not resume until the conciliation had been concluded. M Zahidul Islam, 'Legal Enforceability of ADR Agreement' (2013) International Journal of Business and Management Invention 2319 – 8028. N Gould, P Capper, G Dixon and M Cohen, *Dispute Resolution in the Construction Industry* (1st edn, Telford Publishing, London 1999) cited Giles J "Conciliation or mediation is essentially consensual, and the opponents of enforceability contend that it is futile to seek to enforce something which requires the consent of a party when co-operation and consent cannot be enforced".

[101] *Channel Tunnel Group* v *Balfour Beatty* [1993] A.C. 334 "The contract contained a clause providing that disputes between the employer and the contractor shall, at the instance of either of them, be referred to and settled by a panel of three experts "acting as independent experts but not as arbitrators") before referring the dispute to arbitration". The panel's decision was binding unless and until it was revised by any subsequent arbitration. C Reymond, 'The Channel Tunnel case and the law of International Arbitration' (1993) Law Quarterly Review 109, 337-342

2.7.2. Mediation / Conciliation:

Both mediation and conciliation are voluntary non-adversarial forms of forms of dispute resolution, and can be defined as "a process whereby a dispute between two or more persons or companies is resolved by remitting the dispute to a private hearing before an independent third party (the Mediator) whose role is to assist the parties to reach a mutually satisfactory solution to the matter in dispute".[102] Mediation is used more predominant in common law jurisdictions, while conciliation is used in civil law jurisdictions. The main difference between the two methods is the level of involvement of the third party, the conciliator will propose a settlement solution, whereas the mediator will seek agreement between the parties[103]. The main features of mediation/conciliation are:

- The speed of dispute resolution (mediations can be concluded in one day thus avoiding an antagonistic drawn-out dispute).
- Relatively low legal, court, expert and advocacy fees (provided the parties to the mediation act in good faith, with a willingness to resolve the dispute).
- Confidentiality of the proceedings are subject to the principle 'without prejudice privilege'[104] (which is not recognised in the UAE Courts), "the dispute will only become public if it is necessary to enforce a settlement agreement in Court".[105]
- Flexibility of the process, however, mediation/conciliation is not suitable in resolving complex technical issues.
- The outcome of the mediation is non-binding on the parties unless the parties have signed a mediation agreement (which is a simple contract) "once a settlement has being reached it will bind the parties as in contract, and will preclude the bringing of further proceeding in respect of the matter settled".[106]

Mediation is not a new concept in the ME or UAE and has existed in the region for 1000's of years, but as a method of construction dispute resolution in the UAE the method has not gained much traction to date. Nonetheless, the UAE judicial system and individual Emirate

[102] P Hibberd and P Newman, *ADR and Adjudication in Construction Disputes* (1st edn, Blackwell, Oxford 1999)
[103] Both mediation and conciliation must be recorded under contract for it to become binding on the parties.
[104] "Discussions or documents submitted during the mediation process cannot be used against the party who made or produced them in subsequent proceedings". A Powell, 'Mediation in the UAE' (2012) Law Update 2012, 248, 1
[105] C Clutterham, 'Methods of Dispute Resolution Series: - Mediation' (2010) Law Update 2010, 223, 9
[106] J Uff, *Construction Law* (11th edn, Sweet & Maxwell, London 2013)

judiciaries have attempted to adopted ADR methods. The UAE Federal Law # 26 of 1999[107], Ministerial resolution 133 of 2001 established the procedure of the conciliation and settlement committee and Dubai Law No.16 of 2009 established the CASD[108] which was opened in 2012.

In addition UAE freezones such as the DIFC have their own laws, regulations, courts (SCT[109] and DIFC Court Rules, Part 27[110]) which are independent of the civil and commercial laws of the UAE, together with a number of mediation centres in operation throughout the UAE, such as the ICC Mediation Rules[111], DIAC[112], DIFC-LCIA Mediation Rules[113], ADCCAC[114] and the RICS Mediation Panel[115].

2.7.3. Arbitration:

Internationally Arbitration is preferred to litigation to resolve complex technical construction related disputes, because Arbitration provides a final and internationally enforceable solution to the dispute, refer to the New York Convention[116]. The term "arbitration" has no fixed or

[107] UAE Federal Law 26 of 1999 Concerning the Establishment of Conciliation and Arbitration Committees at Federal Courts

[108] "The Centre for Amicable Settlement of Disputes (CASD) aims to facilitate the amicable and affordable settlement of disputes via mediation within a period of one month before referring the matters to the court to proceed via the usual court process". "Any dispute referred to the Centre will be reviewed by mediators under the direct supervision of the concerned judge". A Powell, 'The Centre for Amicable Resolution of Disputes in Dubai' (2013) Law Update 2013, 256, 13

[109] "In the Small Claims Tribunal (SCT) if both parties agree claims with a maximum value limit of AED 500,000 can be considered by the SCT, if the parties are unable to reach a settlement the DIFC Courts will hold a hearing and deliver a Court judgment". "SCT proceedings are confidential and parties are not normally legally represented". N Bakirci, 'The Role of Mediation in the DIFC Courts' (2015) http://globallawsummit.com/the-role-of-mediation-in-the-difc-courts/ accessed 24 October 2017

[110] DIFC Court Rules (2014) Part 27 Alternative Dispute Resolution

[111] ICC Mediation Rules (2014) was introduced in Dubai in 2014 "The rules govern the parties' agreement to ICC Mediation or any request made by the parties following a dispute to use the ICC Mediation process". "The rules emphasise the strict confidentiality of the process and outcome, they provide for the independence of the mediator and restricts them acting in any future capacity once the mediation is completed". E Al Tamimi, 'Mediation – Does it work in the Middle East' (2014) Law Update 2014, 269, 10

[112] Under the 1994 DIAC Rules there are provisions relating to Conciliation, the provisions set out the procedures and timeframe for conciliation, appointment of the conciliation panel, timeframe for concluding the proceedings and the authentication of the final agreement.

[113] The DIFC-LCIA Mediation Rules (2012)

[114] The Abu Dhabi Commercial, Conciliation and Arbitration Centre (1993)

[115] "The RICS mediation panel was established in (2012) and collaborates with the Dubai Courts to promote public understanding of the advantages of the mediation process as a form of ADR". A Powell, 'Mediation in the UAE' (2012) Law Update 2012, 248, 1

[116] New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. The UAE ratified the New York Convention in 2006 under Federal Decree No. 43/2006. "In theory the New York Convention replaced the provisions of the Federal Law (11) of 1992 ("Civil Procedure Code") concerning the enforcement of foreign judgments in the UAE". M L. Rubert, 'Enforcement of Foreign Arbitration Awards in the UAE' (2014)

definite meaning. "It denotes the placing of a dispute before a third party to obtain a fair or equitable resolution, based on discretion rather than fixed rules",[117] as was described by Stephenson[118]. The main advantages of arbitration have traditionally been "privacy, speed of resolution, cost effectiveness, convenience, finality, certainty and choice of tribunal".[119]

But in recent times some of the benefits of arbitration as a method of resolving disputes in the construction industry have been eroded. Arbitration has evolved to the point where it is almost similar to litigation in terms of cost and time expended. "Around the world, the constant and resounding criticism of arbitration is that it takes too long, and is too appealable, in almost all surveys of arbitration users, time and delay ranks far more significantly than cost".[120] It is clear that arbitration has some inherent structural problems, it can now take two to five years to complete the arbitration process, and sometimes as long to enforce the award, for Contractors with limited financial means this is not an option[121].

Unlike litigation arbitration is a matter of the consent of the parties, and is confidential. "As well as neutrality of forum, arbitration is preferred over litigation because enforcement of an arbitral award is generally less problematic than seeking to enforce the judgement of a local court".[122] The dispute in question will be assessed by the arbitral tribunal, made up of construction industry professional who should have technical, quantum and commercial/contractual expertise conducted according to the rules of the Institution referenced in the Contract (FIDIC 1999 is under ICC Rules) or the arbitration agreement.

However, in the UAE there remains uncertainty as to how the local courts will treat the arbitral award, in terms of enforcement.[123] The losing party may attempt to delay their

---

[117] J Uff, *Construction Law* (11th edn, Sweet & Maxwell, London 2015)

[118] "A voluntary procedure, available as an alternative to litigation, but not enforceable as the means of settling disputes except where the parties have entered into an arbitration agreement, in such cases the right of either party to have disputes resolved by arbitration will, except where there are good reasons to the contrary, be upheld by the court". D.A Stephenson, *Arbitration Practice in Construction Contracts* (3rd edn, E & FN Spon, UK, 1993)

[119] N G. Bunni, *The FIDIC Forms of Contract* (3rd edn, Blackwell Publishing, Oxford 2005)

[120] S Hibbert, 'Dispute Resolution in Abu Dhabi (Part 3) – A Lot Now Rides on Success of the DAB System' (2010) http://kluwerarbitrationblog.com/2010/04/22/dispute-resolution-in-abu-dhabi-part-3-a-lot-now-rides-on-success-of-the-dab-system/ accessed 30 September 2017

[121] Arbitration only benefits parties who have the financial resources to justify fully-fledged arbitration proceedings.

[122] W Godwin, *International Construction Contracts A Handbook* (1st edn, Wiley-Blackwell, UK 2013)

[123] D O'Leary, 'Using Dispute Adjudication Boards to Resolve Construction Disputes' http://www.tamimi.com/en/magazine/law-update/section-14/february-8/using-dispute-adjudication-boards-to-resolve-construction-disputes.html accessed 30 September 2017

liability to make payment as per the arbitration award by invoking technical arguments which would challenge the arbitral award[124]. However, there are a number of clear benefits to arbitration in the GCC region, such as (the parties can decide on the seat, applicable rules, the tribunal and the arbitral process allows for a detailed analysis of claims and defences).

Arbitrations in the UAE are governed and enforceable under Federal Law[125] and treaties such as the Riyadh Convention[126] and GCC Treaty[127] (foreign awards are governed by New York Convention). UAE law address a number of points including enforcement requirements[128]. It seems for UAE Contractors and Employers arbitration is still a better option to litigation both in terms of monetary expenditure, procedural process and certainty of award, However, arbitration is still considerably more costly and time consuming when compared to ADR methods. The UAE has attempted to establish itself as a centre of International Arbitration, with a number of centres such as DIAC[129], DIFC-LCIA[130], ADCCAC[131] and arbitration centres in Sharjah[132] and RAK[133] also. However, the UAE government has not yet introduced legislative framework for arbitration (an Arbitration Act) based on the UNCITRAL Model Arbitration Law[134], although such legislation has been in the pipeline for a number of years[135].

---

[124] Ibid

[125] Federal Law (11) 1992 Civil Procedure Code Articles 203 to 218

[126] Arab Convention on Judicial Cooperation (1983)

[127] Agreement of Execution of Judgments, Delegations and Judicial Summons in the Arab Gulf Cooperation Council countries (1996)

[128] (i) The formalities required in order for an arbitration agreement to be valid; (ii) The constitution of the arbitral tribunal; (iii) The circumstances in which an arbitrator may be dismissed from the arbitral tribunal; (iv) The enforcement of awards; and (v) The circumstances in which an arbitration award can be challenged. M L. Rubert, 'Enforcement of Local Arbitration Awards in the UAE' (2014)

[129] Dubai International Arbitration Centre, which administers arbitrations under the DIAC Arbitration Rules 2007

[130] DIFC London Court of International Arbitration, which administers arbitrations under the DIFC-LCIA Arbitration Rules 2008

[131] Abu Dhabi Conciliation and Arbitration Centre

[132] Sharjah International Commercial Arbitration Centre

[133] Ras Al-Khaimah Commercial and Arbitration Centre

[134] The Model Law on International Commercial Arbitration (1985) and the Revised Model Law (2006) "The Model Law was developed with a view to achieving two main objectives (i) to promote the harmonization and improvement of national laws relevant to the resolution, by arbitration, of disputes arising out of international commercial transactions (ii) offer a legislative model that would prove acceptable to states located in different region, belonging to different legal traditions, and pursuing different economic polices". F Bachard and F Geinas, *The UNCITRAL Model Law after Twenty Five Years: Global Perspective on International Commercial Arbitration* (1st edn, Juris, New York 2013)

[135] The UAE has attempted to enact an arbitration law on two occasions; first in 2008 ("2008 Draft") and later in 2014 ("2014 Draft"). "The current United Arab Emirates ("UAE") `arbitration law' is enshrined in Articles 203-218 of Federal Law No. 11/ 1992, as amended (the "UAE Civil Procedure Code")". S Habib, 'A new arbitration law for the United Arab Emirates third time lucky?' (2017)

2.7.4. Litigation:

"A contract is, by definition, a legally binding agreement and the governing law is stated in the Contract, any disagreement or dispute may eventually be referred to the Courts of the country of the governing law".[136] As a general principle litigation is a process where a "dispute is decided by a court of law with jurisdiction or power over the dispute and to which it has been referred in accordance with its procedures, unlike arbitration the source of a court's power to decide a dispute is not the agreement of the parties".[137]

The UAE legal system[138] is heavily influenced by a combination of legal principles from a number of different legal systems (Napoleonic, Ottoman or Egyptian civil code). The UAE like other Muslim states has three sources of law, which are the constitution, Sharia where legislation is silent (Islamic law is based on two fundamentals, the Quran[139] and the Sunna[140] the combination of these two sources is called Sharia[141], there are also two subsidiaries of Islamic law, the Ijma[142] and the Qiyas[143]) and jurisprudence[144]. As a civil law jurisdiction statutes are the primary source of law in the UAE, each case is decided on its own merits,

---

https://www.lexology.com/library/detail.aspx?g=17b326b4-9f83-4ca3-aa23-b4ca2e0f93f1 accessed 14 November 2017

[136] B W Totterdill, *FIDIC Users' Guide a Practical Guide to the 1999 Red Book* (1st edn, Thomas Telford, London 2001)

[137] W Godwin, *International Construction Contracts A Handbook* (1st edn, Wiley-Blackwell, UK 2013)

[138] The emirates of Abu Dhabi, Dubai, Ajman, Fujairah, Ras Al Khaimah, Sharjah and Umm Al Quwain were formed in 1971 under the UAE federal constitution, which provides for the allocation of power between the federal and each emirate government. The Federal Law prevails over individual Emirate Laws, where the Federal Law is absent or silent the Law of the Emirate will apply.

[139] The holy book of the Islamic religion

[140] "Is a reported compilation of the conversations (hadith) and deeds of the Prophet collected after his death". C Mallat, *Introduction to Middle Eastern Law* (1st edn, Oxford University Press, Oxford 2007)

[141] "Shari'ah is a body of religious, ethical and legal rules, and strives to give effect to the intention of the parties in matters of contract". B Ahmed, C Randeniya and M Kiriella Bandara, 'Litigation and enforcement in the United Arab Emirates: overview' (2017)

[142] "In Islamic jurisprudence (*fiqh*) the matter on which *ijma'* is of interest is understood in one of the two following ways: Any matter related to Shari'ah and any matter (of interest to Muslims)". Shafaat A, 'The Meaning of Ijma' (1984) http://www.islamicperspectives.com/meaningofijma.htm accessed 31 October 2017

[143] "Qiyas provided classical Muslim jurists with a method of deducing laws on matters not explicitly covered by the *Quran* or Sunnah without relying on unsystematic opinion (ray or hawa). According to this method, the ruling of the *Quran* or Sunnah may be extended to a new problem provided that the precedent (asl) and the new problem (far) share the same operative or effective cause (illa)". Oxford Islamic Studies On-line http://www.oxfordislamicstudies.com/article/opr/t125/e1936 accessed 31 October 2017

[144] Jurisprudence includes both laws and regulations relating to the practices of the religion of Islam as well as laws and regulations relating to possession. It is found under UAE Civil Transaction Code, Law # 5 of 1985, Article 2 - "The rules and principles of Islamic jurisprudence (fiqh) shall be relied upon in the understanding, construction and interpretation of these provisions". The Sunni rite of Islam has four schools of jurisprudence, Hanafi, Maliki, Shafii and Hanbali, there is also the Shiah and Zaydi schools of jurisprudence.

unlike the 'doctrine of binding precedent'[145] in common law jurisdictions. Each Emirate has its own judicial system, the structure of the UAE Courts is the Court of First Instance, decision of that Court may be referred to the Court of Appeal and finally to the Court of Cassation, all courts are governed by UAE Federal law[146] (in the UK the courts are governed by the CPR[147], which are statutory rules).

Litigation can quickly become a costly and time consuming exercise with pre-trial procedures and appeals taking years to resolve. In addition, "parties to a construction dispute have no assurances that the judge presiding over the case will have knowledge of the standards of practice of construction, this increases the risk of an erroneous judgement form a judge struggling to comprehend complex industry practices".[148] This is a common issue for parties taking construction related disputes to the UAE Courts, whereby a Court appointed expert[149] will be appointed where the subject matter of the dispute is complex or requires specialized knowledge. Generally, the Court will request an expert report, which will determine the facts of the dispute. "It is the common practice of UAE judges to accept expert reports without modification, questioning, or analysis, therefore, court-appointed experts, play a central and powerful role"[150]. Such expert reports do not always address the root problem of a construction dispute, which could combine technical, planning, quantum and commercial/contractual elements, very few UAE court appointed experts are in fact 'experts' in all of these elements.

The major advantage of litigation over other forms of dispute resolution is parties may be joined in an action, meaning "any number of claimants who have similar interests in the subject matter of the litigation may join together in a claim".[151] Would the UAE benefit from

[145] "The process of deciding a case in accordance with past judicial reasoning used by judges reaching decisions in similar previous cases, the concept of keeping to past decisions is also tied to rules concerning the hierarchy of English courts". S Hanson, *Legal Method and Reasoning* (2nd edn, Cavendish Publishing Limited, London 2003)
[146] UAE Civil Procedure Code, Federal Law # 11 of 1992
[147] English Civil Procedure Rules (1999)
[148] R Fullerton, *American Arbitration Association Handbook on Construction Arbitration and ADR* (3rd edn, Juris, New York 2016)
[149] "The court may, upon its own discretion or at the request of one or both of the parties, appoint an expert from the List of Experts maintained by the jurisdiction's judicial administrative body, the litigants themselves may also stipulate to the selection of a specific expert". Business Laws of the United Arab Emirates (2011) https://www.akingump.com/images/content/4/4/v4/4452/UAE-Business-Law-Book.pdf accessed 11 September, 2017
[150] Ibid
[151] J Uff, *Construction Law* (11th edn, Sweet & Maxwell, London 2013)

a specialised construction court similar to the TCC[152], although the TCC has some flaws[153] if something similar was available to parties in the UAE in would make the process of going to the UAE courts less indeterminate.

2.8. Statutory Adjudication:

Adjudication can be defined as "a process whereby an appointed neutral and impartial party is entrusted to take the initiative in ascertaining the facts and the law relating to a dispute and to reach a decision within a short period of time"[154] (or as identified by the ICC[155]). Lord Ackner stated "Adjudication is a highly satisfactory process, it comes under the rubic 'pay now, argue later' which is a sensible way of dealing expeditiously and relatively inexpensively with disputes which might hold up important contracts".[156] The major difference between adjudication and other methods of ADR is that it results in a decision which is enforceable, even if the other party does not voluntarily comply.

The growth of adjudication in the UK started during the late 1980's and early 1990's at a time when the construction industry was searching for some credible form of alternative dispute resolution, this came in the form of statutory adjudication HGCRA[157]. Prior to 1996 and the introduction of the HGCRA a party who wanted to pursue a dispute beyond the provisions of the contract had two options, firstly refer the dispute to Arbitration if the contract provided for it, or secondly refer the dispute to the courts. The objectives of statutory adjudication was to improve cash flow and establish a speedy and efficient dispute resolution process, based on the principle of 'pay now, argue later' or the 'security of payment

[152] The Technology and Construction Court allows "claims to be brought for building or other construction disputes, including claims for the enforcement of the decisions of adjudicators under the Construction Act (HGCRA)". S Toison, J Glover and S Sinclar, *Dictionary of Construction Terms* (1st edn, Informa Law Routledge, Oxon 2012)

[153] "The TCC is crammed with enforcement proceedings, as losing parties look for some reason for not doing what a procedure enacted for their industry's benefit requires them to do". D Griffiths, 'Do Dispute Review Boards Trump Dispute Adjudication Boards in Creating More Successful Construction Projects?' (2010) Chartered Institute of Arbitrators, 76 Arbitration 4

[154] N G. Bunni, *The FIDIC Forms of Contract* (3rd edn, Blackwell Publishing, Oxford 2005)

[155] "Is to reach a fair, rapid and inexpensive determination of a dispute arising under the contract and this procedure shall be determined accordingly". J Redmond, *Adjudication in Construction Contracts* (1st edn, Blackwell Science, Oxford 2001)

[156] D Griffiths, 'Do Dispute Review Boards Trump Dispute Adjudication Boards in Creating More Successful Construction Projects?' (2010) Chartered Institute of Arbitrators, 76 Arbitration 4

[157] Housing Grant Construction and Regeneration Act (1996) Section 108 (1) A party to every construction contract to which the act applies has the right to refer any dispute arising under the contract to an independent third party. Under the HGCRA 1996 "a party to every construction contract to which the Act applies has the right to refer any dispute arising under the contract to an independent third party for adjudication". J Murdoch and W Hughes, *Construction Contracts Law and Management* (4th edn, Taylor and Francis, London 2008)

principle'[158], in order to protect the Contractor's cash flow. Other common law countries have subsequently introduced statutory adjudication, Australia[159], New Zealand[160], Singapore[161] and Malaysia[162]. However, in civil law jurisdictions statutory adjudication has not yet been implemented to the same extent as common law jurisdictions.

With statutory adjudication the successful party can apply for a summary judgement to the Court for the enforcement of the adjudicators decision, however, the Courts can also move to set aside the adjudicator's decision, refer to *Shaw*[163]. The adjudication process is private[164], with a binding or temporary binding decision given by the adjudicator on or before the 28th day after referral. Adjudication is considerably less costly than arbitration or litigation, however, the process of adjudication has been hijacked, as was highlighted by Judge H.H Toulmin[165]. where the adjudicators decision has not been honoured parties have taken actions through the Courts, refer to *Macob*[166].

---

[158] Building and Construction Industry (Security of Payments) Act (2009) Australian Capital Territory Under Article 6 of the Act [Object of Act] (1) "The Object of this Act is to ensure that a person is entitled to receive, and is able to recover, progress payments if the person – (a) undertakes to carry out construction work under certain construction contracts; or (b) undertakes to supply related goods and services under certain construction contracts". (2) "In particular this Act – (a) grants an entitlement to a progress payment for construction work, whether or not a construction contract provides for progress payments: and (b) establishes a recovery procedure for construction work progress payment".

[159] Building and Construction Industry Security of Payment Act (1999) New South Wales

[160] The Construction Contract Act (2002)

[161] Building and Construction Industry of Payment Act (2004)

[162] The Construction Industry Payment and Adjudication Act (2012) Introduced statutory adjudication as a means of resolving payment disputes under construction contracts for projects carried out in Malaysia.

[163] *Shaw* v *MFP Foundations and Piling Ltd* [2010] EWHC 9 The contractor obtained an adjudicator's decision against the Employer, the Employer did not pay, so the Contractor applied for a court order to enforce the adjudicator's decision. The Employer did not pay sum attached to the court order, and applied to the court to have the statutory demands set aside on the grounds that they had a counterclaim in excess of the adjudicator's award. The court of appeal set aside the statutory demand under the Insolvency Rules, because the 'pay now, argue later' principle cannot override the Insolvency Rules.

[164] "Any information made available during the proceedings should not be released to third parties except insofar as it is necessary to implement the decision of the adjudicator, or as may be required in subsequent arbitral or legal proceedings". N G. Bunni, *The FIDIC Forms of Contract* (3rd edn, Blackwell Publishing, Oxford 2005)

[165] P Coulson, *Coulson on Construction Adjudication* (2nd edn, Oxford University Press, Oxford 2011) cited Judge H.H Toulmin in *AWG construction services Ltd* v *Rockingham Motor Speedway* [2004] EWHC 888 (TCC) "A procedure which parliament introduced to provide a quick, easy and cheap provisional answer so that in particular, sub-contractors were not unjustly kept out of their money. It has developed into an elaborate and expensive procedure which is wholly confrontational".

[166] *Macob Civil Engineering* v *Morrison Construction Ltd* [1999] BLR 93 the Main Contractor (defendant) failed to comply with the adjudicator's decision awarding the plaintiff immediate payment plus VAT, interest and fees, the Plaintiff sought enforcement in the TCC. "The defendant submitted that it was entitled to a stay of the court action pursuant to section 9 of the Arbitration Act 1996, that the adjudicator had been guilty of procedural errors in breach of the rules of natural justice and that summary judgment was inappropriate in the circumstances". The Court upheld the adjudicator's decision. D A. Stephenson, *Arbitration Practice in Construction Contracts* (5th edn, Blackwell Science, Oxford 2001)

2.9. The History of DABs:

As the complexity of construction contracts increased with the rapid developments in construction technology, contractors incurred additional overheads and became more aggressive in protecting their margins, leading to claims, and subsequent disputes. Construction disputes have increased over the past 50 years, methods such as arbitration and litigation have become more expensive, time consuming and technically complex. The construction industry has been creative in exploring different forms of dispute resolution which are cost effective and time efficient, from this DABs have been developed and expanded as an alternative to the traditional dispute resolution methods. In the 20 years since Seppala stated the significance developments of dispute boards[167], DABs have become more widely accepted internationally, but have not replaced arbitration or litigation as the primary method of dispute resolution, this is especially true in the UAE.

DBs developed in the US during the early 1950s and were initially adopted as a form of amicable dispute resolution, and became known as DRBs. During the 1960s The Joint Consulting Board[168] was introduced on the Boundary dam and underground powerhouse in Washington. In 1972 the US National Committee on Tunnelling Technology after conducting a study made further recommendations[169], which led to the first official DRB on the Colorado tunnel project in 1975[170]. The latest DRBF statistical Database as of April 2017 identified the number of projects with DRB's at over 2,800 across almost 60 countries, with a construction value of USD 277 Billion.[171] According to the DRBF statistical data just over 98% of matters referred to the DB are resolved with only 2% progressing to arbitration or litigation.

[167] "The most significant development in procedures for dispute avoidance under international construction contracts in recent years has been the introduction of the dispute review or adjudication board, to resolve disputes instead of litigation or arbitration". C Seppala, 'The new FIDIC provisions for a Dispute Adjudication Board' (1997) The International Construction Law Review, Volume 14, Part 4

[168] "Problems occurred during the course of the project, and the contractor and employer agreed to appoint two professionals each to a four member JCB, in order that the board could provide non-binding suggestions". The project was completed without any litigation. N Gould, 'Establishing Dispute Boards – Selecting, nominating and Appointing Board Members' (2006) Society of Construction Law International Conference in Singapore

[169] The publication was entitled 'Better Contracting for Underground Construction' "in which the undesirable consequences of claims, disputes and litigation were highlighted". P Chapman, 'The Use of Dispute Boards on Major Infrastructure Projects (2015) Turkish Commercial Law Review, Vol 1, No.3

[170] The project consisted of two tunnels which had to be bored, works on the first tunnel were beset by disputes. This prompted the appointment of a panel to give non-binding recommendations on the second tunnel, which involved the same parties, location and contractual terms. The strategy proved successful which results in the spread of DRB's on large infrastructure projects.

[171] The Dispute Resolution Board Foundation DB Project Database https://www.drb.org/publications-data/drb-database/ accessed 30 September, 2017

Construction dispute resolution has been evolving in the UK since the Banwell report[172] and the subsequent reports from Egan[173], Latham[174], Woolf[175], Arbitration Act[176], HGCRA[177], Civil procedure rules[178], the Scheme for Construction Contracts Regulations[179] and The local Democracy, Economic Development and Construction Act[180]. Contractual adjudication was introduced to the UK standard forms[181] in 1970. The JCT[182] standard forms have also been amended to create more robust dispute resolution mechanisms, as have the NEC[183] with the introduction of adjudication. DABs have been successfully used during the London 2012 Olympics[184] and the construction of the Channel Tunnel[185].

Internationally DBs were first used on the major hydro electrical project El Cajor Dam in Honduras, with a DRB style board, DBs were also hugely successful on the Hong Kong

[172] H Banwell, The Placing and Management of Contracts for Building Works,(MSO, London 1964)
[173] J Egan, Constructing the team: Final Report of the Government, industry review of Procurement and Contractual arrangements in the UK Industry (HMSO, London 1994)
[174] Latham Constructing the Team, Final Report of the Government/Industry Review of Contractual and Procurement Arrangements in the UK Construction Industry (HMSO, London 1994) Latham recommended "that a system of adjudication should be introduced within all standard forms of Contract, unless some comparable arrangement already existed for mediation or conciliation".
[175] Woolf Access to Justice, Final Report (HMSO London, 1996) The Woolf report implemented reforms such as the Civil Procedure Rules (1998) and the Access to Justice Act (1999). The Report recommended that a new proactive fast tracked system be adopted by the courts to deal with less complex cases. "The report stopped short of recommending court-annexed ADR but did recommend that parties to litigation should be required, at the pre-trail stage, to state whether they had discussed ADR". J Uff, *Construction Law* (11th edn, Sweet & Maxwell, London 2013). Woolf also recommended that "courts should take into account unreasonable refusal of a court's proposal that ADR should be attempted when considering costs". K Mackie, D Miles, W March and T Allen, *The ADR Practical Guide Commercial Dispute Resolution* (3rd edn, Tottel Publishing, UK 2007)
[176] English Arbitration Act (1996)
[177] The Housing Grants, Construction and Regeneration Act (1996)
[178] English Civil Procedure Rules (1999) are statutory rules that apply throughout the civil courts with the aim of improving the accessibility, speed and efficiency of the procedures of the civil court.
[179] The Scheme for Construction Contracts (England and Wales) Regulations 1998, SI 1998/649
[180] The Local Democracy, Economic Development and Construction Act (2009)
[181] "The Subcontract Form DOM/1 introduced the process in 1976 to deal with subcontractor concerns about the misuse of rights of set-off as excuse for non-payment". J Adriaanse, *Construction Contract law* (2nd edn, Palgrave Macmillan, New York 2007)
[182] JCT Standard Form of Contract with Contractor's Design introduced adjudication in the 1970's
[183] NEC was first published in 1993, the dispute resolution section of NEC 3 provides for options W1 and W2. W1 is used for UK adjudication provisions, the HGCRA apply, W2 is used for international projects where the HGCRA does not apply. Both options provide for adjudication as a mandatory pre-condition to arbitration. Under NEC 4 the emphasis is on dispute avoidance, the dispute resolution section of NEC 4 has been renamed 'Resolving and Avoiding Disputes'.
[184] The 2012 London Olympics had two panels which was successful very few disputes went to adjudication, and no disputes were referred to arbitration. The first panel was the IDAP which were formed at the commencement of the project, the purpose of this panel was to identify and find solutions for problems before they evolved into disputes. The second panels function was to resolve disputes which were not avoided by the IDAP process and implement the adjudication provisions available in the jurisdiction.
[185] The Channel Tunnel Project used two dispute boards, each board had five serving members, one board composed of engineers to deal with technical matters, and the other comprised of financial experts to deal with disputes relating to the financial provisions of the BOOT concession agreement.

Airport project[186]. International financial institutions require projects that they finance to use standing DBs, the World Bank first introduced DBs in 1995[187] and in 2000 published a new edition of the Procurement of Works, which modified the DB to mirror the FIDIC procedures. MDBs first published the Harmonised Conditions for Construction[188](which are a modification of FIDIC 1999) in 2005, the Conditions were subsequently updated in 2006 and 2010, Other international financing bodies such as the IMF, Islamic Development Bank and JICA promote the use of standing dispute boards, when financing large scale construction projects.

FIDIC's contractual dispute resolution mechanisms have developed over the past 60 years, under the 1st Edition (1957) – dispute was referred to the Engineer, Works had to be completed before any ad-hoc arbitration could commence, this was replaced by the ICC arbitration under 2nd Edition (1969). The 3rd Edition (1977) was further developed and provided for arbitration to commence before the Works were completed. The 4th Edition (1987) which is common in the UAE and wider ME – introduced 56 day amicable settlement before starting arbitration, this was made a mandatory step, so the parties could attempt to settle their dispute by methods other than arbitration.

FIDIC first introduced DABs in its Orange Book (1995), the FIDIC (1996) Supplement of the Fourth edition Red Book then adopted a DAB/Dispute Review Expert ("DRE") procedure in favour of the additional approach of relying upon the engineer acting as the quasi arbitrator as well as an agent of the employer or owner. At the time FIDIC were developing DABs there was criticism of the role of the Engineer, and his independence in making determinations[189].

---

[186] The Hong Kong Airport project consisted of a six member DRG (Dispute Review Group) to cover all Main Contracts awarded by the HK Airport authority. When a dispute arose a panel of one or three members were selected depending on the nature of the dispute, the DRG members were selected to provide a range of technical, commercial and legal expertise to disputes that arose.

[187] World Bank, Standard Bidding Documents Procurement of Works (1995) comprised of "inter alia a modified FIDIC contract with provisions for dispute review boards to publish non-binding recommendations". C Chern, *Chern on Dispute Boards: Practice and Procedure* (1st edn, Blackwell Publishing, Oxford 2008)

[188] FIDIC MDB Harmonised Construction Contract "Participating Banks that have a licence to use the MDB Harmonised Construction Contract General Conditions aim to make the General Conditions available in their standard bidding documents which the MDBs require their borrowers or aid recipients to follow". FIDIC MDB Harmonised Construction Contract http://fidic.org/MDB_Harmonised_Construction_Contract accessed 21 August 2017

[189] Under previous forms of FIDIC contracts the role of the Engineer was an independent certifier of the Works and adjudicator in the event of a dispute between the parties. The FIDIC 1999 suite of FIDIC contracts changed the role of the Engineer to one of a direct agent of the Employer. The Abu Dhabi and the Dubai Municipality public sector contracts have reduced the role of the Engineer, in that the "Engineer is obliged to seek the prior approval of the Employer on matters including the contractor's programme and expenditure monies pursuant to

"Given the historic powers of the Engineer under FIDIC contracts, it was not surprising that the dispute board was given powers to make decisions which were binding on an interim basis".[190] The two-tier system of dispute resolution under FIDIC 1987 was replaced by a five-tier process under FIDIC 1999[191].

FIDIC (1999) introduced the most fundamental changes to dispute resolution, under Sub-Clause 20 there was an obligation to refer a dispute to DAB before initiating arbitration proceedings, removing the need to refer a dispute to the Engineer before going to arbitration[192]. The DAB procedure became mandatory rather than an option, for both standing and ad-hoc DABs. Ad-hoc DABs were introduced under FIDIC 1999 Yellow Book (Plant & Design Build) and the Silver Book Engineer Procure and Construct (Turnkey), the reason given for not using a standing DAB in the Yellow and Silver Book was the need to reduce DAB cost. However, Bunni rejects this suggestion[193]. Subsequently, ad-hoc DABs were rejected in the FIDIC Gold Book (2008) "it is now widely accepted that establishing a DAB only after the dispute has arisen is contrary to the fundamental philosophy of the DAB, which is to play a major role in preventing disputes".[194]

---

the contract sum and the issuing of certificates for completion or non-completion of the works".[189] E Sunna and O Al Saadoon, 'FIDIC in the Middle-East' (2007)

[190] M Goodrich, 'Dispute Adjudication Boards: Are they the future of dispute resolution?' (2016) https://www.whitecase.com/publications/article/dispute-adjudication-boards-are-they-future-dispute-resolution accessed 01 September, 2017

[191] "This multi-tier process has justifiably earned for itself the scientific title of 'disputology', particularly in view of the fact that the Supplement to the Fourth Edition of the Red Book added an important aspect to the role of the DAB, that of the Avoidance of Dispute". N G. Bunni, 'Dispute Boards in the Middle East' (2013) DRBF Conference, Paris

[192] Under the 'Guidance for the Preparation of Particular Conditions' for the Red and Yellow Books the Engineer can act in the place of the DAB. "If the Engineer is empowered in this way, the Particular Conditions make it clear that the Engineer must act impartially, notwithstanding that the Engineer generally acts for the Employer". The guidance provides suggested wording for such a clause. J Glover, C Thomas and S Hughes, *Understanding the New FIDIC Red Book: A Clause by Clause Commentary* (1st edn, Sweet and Maxwell, UK 2006)

[193] "Firstly, disagreement that might turn into a dispute do arise even if the work is taking place outside the site, and by using ad-hoc rather than standing DAB, the objective of avoiding dispute is lost". N G. Bunni, 'Dispute Boards in the Middle East' (2013) DRBF Conference, Paris

[194] P Gerber and B J. Ong, 'Look Before you Leap: Avoiding the Traps and Maximising the Benefits of Your DRB' (2012)

2.10. Types of DBs:

A dispute board is basically a tribunal established under the contract to resolve disputes (both formal and informal) as they arise, the dispute board also functions as a vehicle to promote dispute avoidance. The term Dispute Board is a generic terms, and covers the following (as distinguished by the ICC Dispute Board Rules, introduced in 2004):

- DRBs: is a board of impartial professionals formed at the beginning of a project to follow construction progress, encourage dispute avoidance, and assist in the resolution of disputes for the duration of the project, and could be considered a process of dispute attrition[195]. The DRB do not make any binding decisions.
- DABs: "gives a decision which is binding on the parties and enforceable as such but is not usually final, the same dispute can be referred for final dispute resolution by a court or arbitrator".[196]
- CDBs: "normally issues its recommendations as to any dispute referred to it but may issue a decision if so requested by either party and the other party does not object".[197]
- DRA: Appointment of a DRA, can be done when a construction project does not merit the appointment of a full DB. The process was developed in Hong Kong in the 1990s[198].

There is a distinction between DABs and DRBs, in that the function of a DRB is to make a recommendation which both parties voluntarily accept or reject, on the other hand the function of a DAB is to issue decisions in writing that bind the parties, such a decision form the DAB must be implemented immediately, until such a time as the parties agree to the decision, or a arbitral tribunal or court will decide. DRB is advisory, while DAB is adjudicatory.

---

[195] S M John, 'Dispute Review Boards in the Context of UK Construction' (2002) cited Faulkner, Spurin and Slaughter. "A systematic set of mechanisms to timely and efficiently eliminate disputes as early as possible and so preclude or peel away as many disputes as cost effectively as possible, through an innovative reconfiguration of the most useful aspects of classical arbitration methods".

[196] S Jordan, 'Getting on board with dispute boards' (2014) http://www.gulfconstructiononline.com/news/160263_Getting-on-board-with-dispute-boards.html accessed 01 June 2017

[197] "In the event of an objection, the Combined Dispute Board will decide whether to issue a recommendation or a decision based on the rules under which it was constituted". C Chern, *Chern on Dispute Boards* (3rd edn, Informa Law, New York 2015)

[198] The role of the DRA is to "purpose the most appropriate method of dispute settlement and make either a recommendation or a non-binding evaluation, if matters are not resolved within a short period of time, the DRA would be expected to then set the motion for a short form of arbitration". N G Bunni, 'What has History Taught us in ADR? Avoidance of Dispute' (2015) 81 Arbitration, Issue 2, Chartered Institute of Arbitrators

2.11. DB Procedures & Rules:

DB procedure have certain characteristics which differentiate it from other dispute resolution processes, in that they operate throughout the duration of a project and the DBs determination will ordinarily be only temporarily binding and is not enforceable in the same way an arbitral award is. "The board is usually equipped with procedural powers enabling it to establish the facts of the dispute",[199] and is empowered to decide on its own jurisdiction, similar to the 'competence-competence doctrine'[200] in arbitration. The Powers and Authority of the DB is specified in the Procedural Rules, there are a number of international institutions which prescribe procedures and rules for the operation of Dispute Boards. In the US the AAA DRB Rules[201] are the most common[202].

The ICC Dispute Board Rules were launched in 2004[203], and updated in 2015[204] "the rules have strengthened the obligation to comply with recommendations and decisions, when so required, by disallowing objections on the merits as a defence to non-compliance and through explicit use of the terms 'final' and 'binding'." The major change was with regards Article 15[205] and Article 16[206] were that it "empowers the DB to intervene if it considers there to be a potential disagreement between the parties, the DB may raise the matter with the parties and encourage them to avoid disagreement, and help them define the potential disagreement or suggest a procedure that they might follow".[207]

---

[199] R Ragnar and V Mahnken, 'ICC Dispute Board Rules: the Civil Law Perspective' (2006) 72 Arbitration 4

[200] The "Competence-Competence" Doctrine It is a general principle of international commercial arbitration that a tribunal is empowered to make a determination as to its own jurisdiction to deal with the substantive claims in dispute C Bailey, D Roughton, D Gilmore, G Margetson, P Godwin and K Willock, 'The competence-competence doctrine and the enforcement of arbitral awards' (2011) https://www.lexology.com/library/detail.aspx?g=70303764-71b7-4352-babb-6c8c8d399190 accessed 23 September 2017

[201] AAA Dispute Resolution Board Hearing Rules and Procedures (2000)

[202] The focus of the AAA procedure is on party autonomy based on a model contract that documents the rights and responsibilities of owners, contractors and members of the DRB.

[203] ICC Dispute Board Rules (2004) The 2004 Rules give the parties a choice between DABs, DRBs and CDBs each distinguished by the type of conclusion it issues upon formal referral. The rules cover appointment of the DB members, services they provide and compensation they receive. The ICC Dispute Board Rules "provided for dispute review and adjudication detached from a specific industry sector". R Harbst and V Mahnken, 'ICC Dispute Board Rules: the Civil Law Perspective' (2006) 72 Arbitration 4

[204] ICC Dispute Board Rules (2015) "The new rules explicitly provide that, upon perceiving a potential disagreement, the dispute board may (1) encourage the parties to overcome it on their own, if this is impossible or the disagreement to entrenched, the dispute board can (2) intervene with informal assistance to help the parties resolve the matter by agreement or (3) determine a dispute through a recommendation or a decision issued after a procedure of formal referral".

[205] ICC Dispute Board Rules (2015) Article 15 [*Powers of the DB*]

[206] ICC Dispute Board Rules (2015) Article 16 [*Avoidance of Disagreement*]

[207] N Khokhar and D Brown, 'The New 2015 ICC Dispute Board Rules' (2016) https://www.clydeco.com/insight/article/the-new-2015-icc-dispute-board-rules accessed 05 November 2017

ICE Dispute Board Procedures[208] were first issued in 2005. The rules offer two different choices, one for international projects which would not be subject to the HGCRA, and another for UK projects which would be compliant with the Act[209]. The CIArb through the Practice and Standards Committee published its Dispute Board Rules in August, 2014[210]. The rules had three key elements[211]. The FIDIC 1999 suite of Contracts under Annex to the General Conditions of the FIDIC Dispute Adjudication Agreement sets out the procedural rules for the DAB under nine different clauses/rules. The procedural rules for the various international organisations listed above are similar, and provide for the following:

- Who and how the DAB members and chairperson should be appointed.
- Payment of the DB members.
- The replacement of DB members.
- Default appointment of DB members (only the AAA has no default procedure for three board members).
- Referral to the DB, precondition under FIDIC 1999 that the Contractor must first notify the Engineer under Sub-Clause 20.1 [*Contractor's Claims*].
- Time allowed for the DB to give a decision.
- Effect of the determination (AAA is a non-binding recommendation, while FIDIC is temporary binding or final and binding if no NoD is served).
- Periods for serving notice, range from 14 days (AAA) to 30 days (ICC).
- Content of the NoD, should be a written notice.
- What may be referred to arbitration or litigation, is not specified under AAA or ICE rules.

[208] ICE Dispute Board Procedures (2005) "The Contract may require the DB to make a recommendation, which is not binding, or to make a decision, which is binding and enforceable and will stand unless superseded by agreement, arbitration or a judgment by the Courts".
[209] "These procedures and rules may need to be modified to comply with any statutory requirements in the applicable jurisdiction".
[210] Chartered Institute of Arbitrators Dispute Board Rules (2014) "The need for prompt, cost effective and impartial dispute resolution can be found in many contractual relationships in several industries, in order to meet this need the CIArb Dispute Board Rules cater to any medium or long-term project, whether construction, IT, commercial or otherwise".
[211] "(i) A dispute board clause inserted into the contract. (ii) The rules themselves. (iii) A tripartite agreement between the DB and the two parties to the contract". M O'Reilly, 'Legislation, Rules and Guidelines – The Chartered Institute of Arbitrators Dispute Board Rules' (2015) 81 Arbitration Issue 2, Chartered Institute of Arbitrators

- The form of DB appointment is by Tripartite[212]/Dispute Board agreement.

2.12. Overview of FIDIC 1999 Clause 20:

The dispute resolution procedures under FIDIC 1999 are a multi-tier process which promotes dispute resolution, "it starts with a dispute adjudication procedure followed by an amicable dispute resolution mechanism and if both of these fail, then arbitration".[213] The FIDIC DAB procedural rules "allow an inquisitorial approach and for the DAB to take the initiative in ascertaining the facts and matters required for a decision"[214], unlike the role of the arbitrator. FIDIC forms of Contract provide a mechanism for binding decisions as opposed to simple recommendations. The DAB procedures under FIDIC 1999 consist of:

i. Clause 20 – the Dispute Adjudication Board.
ii. Appendix – General Conditions of Dispute Adjudication Agreement.
iii. Annex 1 – Procedural Rules.
iv. The Dispute Adjudication Agreement.

2.12.1. Establishing the Dispute Board:

When appointing the DAB the parties need to consider a number of matters, such as identifying, nominating and selecting board members, whether the board will consist of one or three members[215](depending on what is stated in the Appendix to Tender), or if the DAB

[212] A tripartite agreement "is the contractual mechanism establishing the rights and responsibilities of the contracting parties and the members of the DB". It is a three multi party contract between the employer, contractor and one member of the DB. The agreement comes into force at the contract commencement date, or when all parties have signed the agreement. The parties cannot directly request advice from the DB member with regards any claims or disputes relating to the project, nor can any DB member be appointed as an arbitrator or called to give evidence as a witness by either party. The DB members can become liable for any negligent act on their part done in the discharge of their DB services, therefore, they are obliged to disclose issues relating to conflicts, impartiality and independence. The Appendix to the FIDIC General Conditions of Dispute Adjudication Agreement provides for a Dispute Adjudication Agreement, which is tripartite. R J Smith and R A Rubin, *American Arbitration Association Handbook on Construction Arbitration and ADR* (3rd edn, Juris, New York 2016)

[213] N G. Bunni, 'A Comparative Analysis of the Claim & Dispute Resolution Provisions of FIDIC 1999 Major Forms of Contract Against its Earlier Forms' (2005)

[214] M Goodrich, Dispute Adjudication Boards: Are they the future of dispute resolution? (2016) https://www.whitecase.com/publications/article/dispute-adjudication-boards-are-they-future-dispute-resolution accessed 30 July 2017

[215] "The DAB shall comprise, as stated in the Appendix to Tender, either one or three suitably qualified persons (the members)". If the number is not so stated and the Parties do not agree otherwise, the DAB shall comprise of three persons.

will be a 'Standing'[216] or 'Ad-hoc'[217]. The DAB should be impartial, independent, and neutral, have no conflict of interests (Duty of Disclosure[218]) and serve both parties equally and fairly, refer to *Amec*[219]. DAB members do not act as consultants or give advice on how the works are to proceed. However, the DAB may consult with external experts in order to carry out their duties. It is also important that the DAB members have a good contract law background, and know how such laws are applied to construction contracts. They should also have the ability to "assess potentially contradictory interpretations of law"[220] this will result in better decisions being made.

It would be beneficial to all parties if the DAB members have good technical knowledge and experience of dispute resolution, procedural rules, and be able to identify with the Employer and Contractor in terms of culture and language. The challenge for the parties is to establish a DAB at the outset of the project, rather than waiting for a dispute to arise, "there is a need to identify, consider and agree the appropriate individuals for the project, as well as to consider independence and impartiality, and establish, and be seen to establish, a level playing-field

[216] It is important where the contract provides for a standing DAB that it is appointed as soon as possible, allowing the DAB become part of the project team, "so their advice will be readily accepted by all parties". The benefit of a standing DAB is that the DAB members can help the parties resolve their difference as and when they arise, thus preventing the parties becoming polarised in their views. The purpose of the standing board is dispute avoidance by encouraging the parties to solve their differences through direct communication at an early stage, thus preventing disputes being referred to arbitration in the future. This approach generally results in reduced costs, legal fees, loss of productivity and maintains the professional and business relationships between the parties. N Gould and C Lockwood, 'Dispute Board Rules Chartered Institute of Arbitrators' (2014) Practice and Standards Committee

[217] An ad-hoc board is only appointed once a dispute has arisen, and is dispersed once a decision is made, therefore, the board does not have the advantage of familiarity with the project team. The obvious benefit of this type of DAB would be the cost saving as compared to a standing DAB. It is important for an ad-hoc DAB that the parties ensure disputes surrounding the appointment of the DAB is minimised, by having a list of pre-approved individuals named in the Contract, for one or multiple ad-hoc DABs.

[218] The duty to disclose all facts which might lead to a challenge of the adjudicators decision/award, or any circumstance that may arise which could call into question the independence or impartiality of the adjudicator. L A. Mistelis, *Concise International Arbitration* (1st edn, Kluwer Law International, Netherlands 2010)

[219] *Amec Capital Products Ltd* v *Whitefriars City Estates Ltd* [2004] EWHC 393 (TCC) "Adjudicator breached the rules of natural justice and had obtained legal advice which was not disclosed to the parties for comment, he had had a telephone conversation with a Partner at the solicitors acting for *Amec* that went beyond merely administrative letters, and he would be bias because *Amec* had put the Adjudicator on notice they would be looking to him for the costs of their first adjudication". Court held "if an adjudicator sought advice for a third party, then it was essential that he informed the parties in advance, notified the parties of how the questions had been put in order that the parties had the opportunity to evaluate the advice and comment". https://www.fenwickelliott.com/research-insight/adjudication-case-notes/amec-capital-projects-limited-v-whitefriars-city-estates-limited accessed 20 November 2017

[220] What to expect from your FIDIC dispute adjudication board members https://www.out-law.com/en/topics/dispute-resolution-and-litigation/arbitration-and-international-arbitration/what-to-expect-from-your-fidic-dispute-adjudication-board-members/ accessed 02 October 2007

for the contractor and employer".[221] At the beginning of the project it remains unclear if disputes will revolve around legal or technical issues, therefore the appointment of the DAB members should be a mixture of both legal and technical specialists. The ICC DB centre suggests that the DB should be preferably two engineers and one lawyer. Preferably board member should be on the FIDIC, ICC, AAA or ICE DB lists, and should be able to demonstrate continuing professional development. The ICC[222] and ICE[223] also have procedures on the appointment of DB members.

Under FIDIC Sub-Clause 20.2[224] the DAB must be appointed 28 days after the commencement date, and stay in place until project completion. If the DAB is to consist of three members, the parties will select one member from the list submitted by the other party, the two party-appointed members will then proceed to nominate the third member (president), who must be approved by both the Employer and Contractor. Sub-Clause 20.2 also deals with replacement[225] and termination[226] of DAB members. A member of the DAB that wishes to resign must give 70 days' notice to the Employer and Contractor, the agreement will expire after the 70th day.

The provisions for establishing the DAB do not preclude either the parties from seeking other methods for final dispute settlement. However, the benefits of appointing a standing DAB at the commencement of the contract is immeasurable, this allows the board familiarise themselves with the project before any disputes arise. The advantage of this is that when a dispute does arise the DAB can deal with it immediately, no time is wasted. Difficulties arise when all DAB members are rejected by one or both of the parties. The contract should

[221] N Gould, 'Establishing Dispute Boards – Selecting, Nominating and Appointing Board Members' (2006) Society of Construction Law International Conference in Singapore
[222] ICC DB Rules Article 7 [*Appointment of DB Members*]
[223] ICE DRB Procedures Clause 2 [*Appointment of the Dispute Board*]
[224] FIDIC 1999 Red Book Sub-Clause 20.2 [*Appointment of the Dispute Adjudication Board*]
[225] "If at any time the Parties so agree, they may appoint a suitably qualified person or persons to replace (or to be available to replace) any one or more members of the DAB. Unless the Parties agree otherwise, the appointment will come into effect if a member declines to act or is unable to act as a result of death, disability, resignation or termination or appointment". C Chern, *Chern on Dispute Boards Practice and Procedures* (3rd edn, Routledge, New York 2015)
[226] "The appointment of any member may be terminated by mutual agreement of both parties, but not by the Employer or Contractor acting alone". "Unless otherwise agreed by both parties, the appointment of the DAB (including each member) shall expire when the discharge referred to in Sub-Clause 14.12 [*Discharge*] shall have become effective". C Chern, *The Law of Construction Disputes* (2nd edn, Informa Law Routledge, New York 2016) If the parties do agree to terminate the appointment of an individual member of the DAB, then they should replace that person by agreement or if the parties cannot agree by nomination of the appointing entity.

contain a default appointment mechanism, similar to FIDIC Sub-Clause 20.3[227]. If one or both parties fail to appointment or nominate a member (or members) to the DAB under Sub-Clause 20.2, or the parties cannot agree to the appointment of the DAB chairman, or the parties fail to replace a DAB member within 42 days, then either party may file a request to the FIDIC President, or the official named in the Appendix to Tender shall seek to appoint a member (or members) of the DAB panel. The ICC also provides for a default appointment Article 7.2, 7.3, 7.4 and 7.5 and the ICE DRB procedures under clause 3.1.

2.12.2. Referring to the Dispute Board:

Under FIDIC Sub-Clause 20.4[228] probably the most important element of the DAB is that, the DAB must give a ruling on the dispute within a period of 84 days from the date of the written notification of the dispute[229]. This is significantly more time than under UK statutory adjudication (HGCRA), whereby a decision must be made within 28 days of referral, refer to *CIB Properties*[230]. The World Bank[231], ICC[232] and ICE[233] also have rules prescribing the time the DB has to give a decision. DAB members receive regular progress reports and information with regards the status of the works[234], the DAB should maintain all relevant project specific documents, and issue site reports after each scheduled visit. DAB members must have, "the time and knowledge to deal with the matters as they arise, decisions always need to be supported by reasons to satisfy the losing party".[235] The DRBF describes the

[227] FIDIC 1999 Red Book Sub-Clause 20.3 [*Failure to Agree Dispute Adjudication Board*]
[228] FIDIC 1999 Red Book Sub-Clause 20.4 [*Obtaining Dispute Adjudication Board's Decision*]
[229] "Within 84 days after receiving such reference, or within such other period as may be proposed by the DAB and approved by both Parties, the DAB shall give its decision, which shall be reasoned and shall state that it is given under this Sub-Clause".
[230] *CIB Properties* v *Birse Construction* [2004] EWHC 2365 the initial submission to the adjudicator contained 50 arch folders which increased to 150 during the adjudication process. The adjudicator's timescale for giving a decision was extended on a number of occasions by the mutual consent of the parties. However, the adjudicator's decision was challenged on the grounds the dispute could not be resolved fairly within the timescale of the adjudication. The judge held that "the complexity of the case was not the test to be applied, but rather whether the adjudicator was able to reach a fair decision within the timescale allowed by the parties". J R. Knowles, *200 Contractual Problems and their Solutions* (3rd edn, Wiley-Blackwell, UK 2012)
[231] "The standard bidding documents for procurement of works by the World Bank the DRB has to make its recommendations at the latest 84 days after it has been notified". R Ragnar and V Mahnken, 'ICC Dispute Board Rules: the Civil Law Perspective' (2006) 72 Arbitration 4
[232] ICC DB Rules Article 22 [*Time Limit for Issuing a Conclusion*]
[233] ICE DRB Procedures Clause 4.5 [*Referral to a Dispute Board*]
[234] The ICC DB Rules, Articles 11 and 12 "contain provisions ensuring that board members are kept informed on the major developments on site from the beginning of the project, irrespective of whether a dispute occurs". R Ragnar and V Mahnken, 'ICC Dispute Board Rules: the Civil Law Perspective' (2006) 72 Arbitration 4
[235] P Taplin and G Atherton, 'Will Hindsight Promote the Case for Dispute Adjudication Boards?' (2014) Adjudication Society Newsletter

obligations of DB members[236], as well as providing guidelines during the course of their service[237].

Both parties are contractually obliged to refer any dispute in writing to the DAB in connection with or arising out of the Contract. The DABs investigation of the dispute will only commences once the Chairman of the DAB receives the notice of dispute[238]. The Referring party will give the history of the dispute in writing or orally, and the board will issue a timetable of proceedings. The board will conduct a hearing and may request particular items of evidence, such as additional documents, further submissions, witnesses of facts and maybe expert evidence. The board will invite the defending party to set out their opening statement, each party has the right to put their case to the board, refer to *Balfour Beatty*[239]. At the end of the process the parties will make their closing statements, and the Board will then make their recommendation or issue an award in favour of one of the parties.

The DABs decision is mandatory and binding on both parties[240], this is known as a 'temporary final and binding effect', which both parties must comply with, unless the DAB decision is revised by Sub-Clause 20.5[241] or Sub-Clause 20.6[242]. "The decision becomes, in

[236] DB members must not have (i) Any direct or indirect financial ties, or employment ties (present or past) with any party involved in the contract. (ii) A close personal or professional relationship with a key member of any party directly or indirectly involved in the contract, which could give rise to the perception of bias. (iii) A financial interest in the project or contract. DRBF Practices and Procedures (2007) http://www.drb.org/concept/manual/ accessed 30 September 2017

[237] DB member must not be (i) Employed as a consultant by any party directly or indirectly (unless written permission is obtained from the other party) involved in the contract. (ii) "Participate in any discussions regarding future business or employment, either full-time or as a consultant, with any party that is directly or indirectly involved in the contract, except for services as a DRB member on other contracts, unless specific written permission from the other party is obtained".[237] N Gould, 'Establishing Dispute Boards – Selecting, Nominating and Appointing Board Members' (2006) Society of Construction Law International Conference in Singapore

[238] "If a dispute (of any kind whatsoever) arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works, including any dispute as to any certificate, determination, instruction, opinion or valuation of the Engineer, either Party may refer the dispute in writing to the DAB for its decision, with copies to the other party and the Engineer". A Hewitt, *Construction Claims and Responses: Effective Writing and Presentation* (2nd edn, Wiley Blackwell, UK 2016)

[239] *Balfour Beatty* v *London Borough of Lambeth* [2002] EWHC 597 (TCC) The adjudicator tried to obtain certain information from the parties relating to the programme demonstrating the link between the programme and the delay events. After only receiving partial information the adjudicator prepared his own critical path analysis, and made his decision based on his own critical path analysis. "The complaint in this case was that the adjudicator had not given the parties an opportunity to review and comment upon the critical path analysis, as a result the Court held that the adjudicator had exceeded his jurisdiction by making good the material deficiencies in Balfour Beatty's claim and by not giving a party a reasonable opportunity of commenting upon the critical path analysis produced by him. The application for summary judgment was therefore dismissed". https://www.fenwickelliott.com/research-insight/adjudication-case-notes/balfour-beatty-construction-limited-v-mayor-burgesses-london-borough-lambeth accessed 21 October 2017

[240] "The decision shall be binding on both parties, who shall promptly give effect to it".

[241] FIDIC 1999 Red Book Sub-Clause 20.5 [*Amicable Settlement*] If the reasons for dissatisfaction cannot be resolved amicably under Sub-Clause 20.5 they are then referred to Arbitration under Sub-Clause 20.6. The DAB

effect, a contractual obligation on both parties such that non-compliance with it by either of them is a breach of contract and the party in breach would be liable in damages".[243] Notwithstanding any temporary award the contractor must continue to proceed with the Works while the dispute is being reviewed by the DAB, unless the Contract has been abandoned, repudiated or terminated.

2.12.3. Dissatisfaction with the Dispute Boards Decision:

Under FIDIC Sub-Clause 20.4 either party can give NoD to the DABs decision within 28 days after receiving the decision, or if the DAB fails to give a decision with 84 days[244]. The party giving the NoD must clearly set-out the reasons for the dissatisfaction. It is therefore important that the DAB recommendations are in writing and are made directly to the contracting parties by presenting its decision in a reasoned well organised manner in line with the applicable rules and procedures to be followed, and with reference to the legal principles involved. This will give the parties confidence that all aspects of the dispute were analysed by the DAB when giving the final decision, and will more than likely result in the parties accepting the decision without the need to resort to arbitration.

If either of the parties gives a NoD to the other party within 28 days after receiving a DABs decision, the decision will be **binding, but not final**. In the absence of a NoD the DABs decision will be **final and binding** on the parties, as the parties would have agreed under the Conditions of Contract[245]. Failure to serve a NoD would mean the parties are bound by such a clause, and the DABs decision would become final and conclusive. When the DABs decision is binding, but not final it can be overturned by the courts or arbitral tribunal for a final determination, nonetheless, the parties must comply with the DAB ruling until the decision is overturned. However, the party to whom the DAB awarded the decision in favour of, may not

will not be performing its intended function if one party raises a NoD with every DAB decision, leaving the other party without some form of interim relief, the parties will then have to refer the dispute to arbitration or litigation (depending on what the contracts expressly states).

[242] FIDIC 1999 Red Book Sub-Clause 20.6 [*Arbitration*]

[243] N G. Bunni, 'A Comparative Analysis of the Claim & Dispute Resolution Provisions of FIDIC 1999 Major Forms of Contract Against its Earlier Forms' (2005)

[244] "In either event, this notice of dissatisfaction shall state that it is given under this Sub-Clause, and shall set out the matter in dispute and the reason(s) for dissatisfaction". "Except as stated in Sub-Clause 20.7 [*Failure to Comply with Dispute Adjudication Board's Decision*] and Sub-Clause 20.8 [*Expiry of Dispute Adjudication Board's Appointment*], neither Party shall be entitled to commence arbitration of a dispute unless a notice of dissatisfaction has been given in accordance with this Sub-Clause".

[245] "The difference between a decision being 'binding', or 'final and binding' is that the arbitral tribunal can consider the failure to promptly give effect to a DABs final and binding decision and issue an interim award for immediate payment". N Gould, 'Enforcing a Dispute Board's decision: Issues and Considerations' (2013)

want to wait for a final determination by way of arbitration or litigation, where they may be exposed to insolvency due to the other party evading the DAB decision, especially where a decision is binding, but not yet final refer to *Persero*[246].

2.12.4. Enforcement of the Dispute Boards Decision:

The enforcement of the DAB decisions will have an immense impact on the attractiveness of the process, especially in jurisdictions such as the UAE where there is no Statutory Adjudication legislation, any failure to abide by the DAB decision would result in a breach of contract. However, there are practical difficulties in ensuring that the binding decisions of the DAB can be enforced, "because there would rarely be access to the courts to ensure that decisions were enforced (as would be the case with statutory adjudication)".[247] If one party believes the DABs decision is fundamentally flawed they need to be proactive and commence arbitration at the end of the amicable settlement period, and seek to overturn the DABs decision. Because, "the party seeking payment does not have to enforce the payment claim in arbitration, it is the paying party that has to commence arbitration proceedings to challenge the DAB decision and claim return of payment".[248]

Under FIDIC Sub-Clause 20.7 there is provision for the successful party to enforce the DAB decision[249]. However, there is a gap or lacuna in the current draft of Sub-Cause 20.7, in that there is no solution offered "when a DABs decision has **not become final and binding** (i.e. where one of the parties is dissatisfied with the decision), and the Party against whom the decision was made fails to comply with it".[250] The non-compliant party will be in breach of

[246] *CRW Joint Operation* v *PT Perusahaan Gas Legara (Persero) TBK* [2011] SGCA 33 "The Tribunal stated that the main issue in contention between the parties was the meaning and effect of the following sentence appearing in Sub-clause 20.4: 'The (DAB) decision shall be binding on both parties, who shall promptly give effect to it unless and until it shall be revised by amicable settlement or on an arbitral award as described below'. The Arbitral tribunal held that even where the NoD is served the DABs decision is binding, and the Respondent is contractually obliged to comply with the DABs decision under the express terms of sub-clause 20.4". C Seppala, 'How not to Interpret the FIDIC Disputes Clause: The Singapore Court of Appeal Judgment in Persero' (2012) The International Construction Law Review, Volume 29, Part 1

[247] M Goodrich, 'Dispute Adjudication Boards: Are they the future of dispute resolution?' (2016) https://www.whitecase.com/publications/article/dispute-adjudication-boards-are-they-future-dispute-resolution accessed 30 July 2017

[248] R Ragnar and V Mahnken, 'ICC Dispute Board Rules: the Civil Law Perspective' (2006) 72 Arbitration 4

[249] "In the event that: (i) Neither Party has given notice of dissatisfaction within the period stated in Sub-Clause 20.4. (ii) The DABs related decision (if any) has become final and binding, and (iii) A Party fails to comply with the decision, then the other Party may, without prejudice to any other rights it may have, refer the failure itself to arbitration under Sub-Clause 20.6".

[250] N G. Bunni, 'The Gap in Sub-Clause 20.7 of The 1999 FIDIC Contracts for Major Works' (2005)

contract, and the Party to whom the decision was awarded would be without a mechanism to enforce it promptly.

A number of arbitral tribunals found Clause 20 unclear as to whether the party that had failed to comply with the DAB decision which was '**binding' but not 'final'**[251] could be referred to arbitration under Sub-Clause 20.6 in a similar manner to a '**final and binding**' decision under Sub-Clause 20.7. Bunni identified that "Sub-Clause 20.7 is worded in such a way that it only deals with the event where the Parties are satisfied with the decision",[252] and does not indicate how to enforce a DAB decision which has been challenged in the 28 day period provided under Sub-Clause 20.4. There is no denying that there are issues with the enforcement of DAB decisions, as was seen in the recent *Persero*[253] cases (2011 and 2015) mainly due to the fact FIDIC 1999 Clause 20 is ambiguous under certain Sub-Clauses. FIDIC

[251] "A DAB decision is 'binding' and not 'final' when either Party, within 28 days after receiving the DAB decision, gives notice to the other party of its dissatisfaction with the DAB decision".

[252] N G. Bunni, 'The Gap in Sub-Clause 20.7 of The 1999 FIDIC Contracts for Major Works' (2005) It was suggested by Bunni that Sub-Clause 20.7 is a "form of appeal to an arbitral tribunal seeking to confirm through an arbitral award the requirement of compliance, as neither party had declared its dissatisfaction within 28 days".

[253] *CRW Joint Operation* v *PT Perusahaan Negara (Persero) TBK* [2011] SGCA 33 In 2006 PT Perusahaan Gas Negara (Persero) (the Employer) a publicly owned Indonesian company and CRW Joint Operation (the Contractor) entered into a Contract based on FIDIC 1999 Red Book for the design, procurement, installation, testing and commissioning of a 36 inch diameter pipeline in Indonesia. During the course of the project a number of disputes were referred to the DAB, but only one dispute for variations valued at USD 17 million became contentious, the DAB awarded CRW USD 17 million. However, the Employer did not agree with the decision and filled a notice of dissatisfaction, and refused to pay the USD 17 million.

After amicable settlement failed the CRW filed a request for Arbitration in 2009, pursuant to Sub-Clause 20.6 [*Arbitration*] (The Contract provided for ICC Arbitration in Singapore) for the purpose of enforcing the DABs decision. PGN argued that "CRW's request for prompt payment should be rejected as the decision was not yet final and binding and asked the arbitral tribunal to open up, review and revise the decision of the DAB pursuant to Sub-Clause 20.6". The Employer did not file a counterclaim at that stage. The tribunal decided it had no jurisdiction to open up and review the DABs decision and issued CRW the award of USD 17 million based on the DABs decision, which was not final, but binding.

The Contractor sought to enforce the award in the Singapore High Court, and the Employer sought to have the award set aside, on the ground that the tribunal had no power to issue a Final Award, the Singapore High Court agreed with the Employer and the award was set aside based on two principles. Firstly, "the HC found that the dispute with regards the enforcement of the DABs original decision should have been referred back to the DAB before commencing arbitration, the non-payment of the DAB award was a second dispute. Secondly, the HC found that "sub-clause 20.6 does not allow an arbitral tribunal to make final a binding DAB decision without hearing the merits of that DAB decision".

The Contractor appealed in 2011. However, the Court of Appeal held that the tribunal had acted in excess of its jurisdiction by issuing a Final Award. The Court gave an opinion that "there was a 'settled practice' in FIDIC cases for the tribunal to issue an interim or partial award pending the final resolution of the parties' dispute".

PT Perusahaan Negara (Persero) TBK v [253] *CRW Joint Operation* [2015] SGCA 30 The Contractor commenced a fresh arbitration based on the Court of Appeals advice, and sought an interim decision establishing the employer's interim obligation to make payment. The new tribunal issued an interim award of USD 17 million in 2011. The Employer again sought to have the award set aside in the Singapore High Court, which was dismissed. The Employer appealed. In the time between the High Court decision and the Court of Appeal hearing the Arbitral tribunal issued a Partial Award for USD 13 million. However, the Court of Appeal recognised the second Award as final and awarded the full USD 17 million.

have taken proactive measures to resolve the ambiguities that existed and issued a Guidance Memorandum[254], "to make explicit the intentions of FIDIC in relation to the enforcement of the DAB decisions that are **binding and not yet final**".[255] The amendment suggested an "express provision on enforceability of merely binding decisions without other steps needed, and allowing a sum award by a DAB to be included in subsequent payment applications".[256]

There are two schools of thought on Sub-Clause 20.7 the first school of thought is that a "DAB which has been challenged by a NoD cannot be summarily enforced as an instrument in its own right, the second school argues that it can be".[257] Both Dedezade[258] and Gillion[259] argued that a second referral to the DAB was necessary to enforce the original DAB decision, while Seppala[260] argued that the enforcement of the DABs decision should be treated separately to the original dispute. Both schools of thought have their merits, the first school relies on a fair meaning of the words used in the contract, while the second school is more of a 'pay now argue later' philosophy. In the *Persero* case the Singapore HC put emphasis on the 'pay now, argue later' formula/argument, however this formula/argument was not considered under the *Persero* contract or by the Singapore CA. It will be interesting to see if this judgement will be developed in other legal jurisdictions, especially in the UAE. There are provision of UAE Law that could be relied on to enforce a DAB decision, it has yet to be

[254] FIDIC Guidance Memorandum to Users of the 1999 Conditions of Contract (2013) the wording of Sub-Clause 20.7 was replaced entirely "In the event that a party fails to comply with any decision of the DAB, whether binding or final and binding, then the other party may, without prejudice to any other right it may have, refer the failure itself to arbitration under Sub-Clause 20.6 [Arbitration] for summary or other expedited relief, as may be appropriate". "Sub-Clause 20.4 [*Obtaining Dispute Adjudication Board's Decision*] and Sub-Clause 20.5 [*Amicable Settlement*] shall not apply to this reference".

[255] N Bunni, C Ong and M O'Reilly, 'The Enforcement of Dispute Adjudication Board Decisions: Persero and the FIDIC Standard Form of Contract' (2015) 81 Arbitration, Issue 4 Chartered Institute of Arbitrators

[256] S Jordan, 'Adjudication is future of dispute resolution' (2015) http://www.cmguide.org/archives/4108 accessed 28 September 2017

[257] N Bunni, C Ong and M O'Reilly, 'The Enforcement of Dispute Adjudication Board Decisions: Persero and the FIDIC Standard Form of Contract' (2015) 81 Arbitration, Issue 4 Chartered Institute of Arbitrators

[258] T Dedezade, 'Are 'binding' DAB decisions enforceable? (2011) Construction Law International, Volume 6, Issue 3

[259] F Gillion, 'Enforcement of DAB Decisions Under The 1999 FIDIC Conditions of Contract' (2011) The International Construction Law Review

[260] In the first Persero case Seppala held that the Court of Appeal had made four errors "(i) The CA failed to understand what the Arbitral Tribunal was appointed to decide (ii) The CA misinterpreted sub-clause 20.7 (iii) The CA misinterpreted sub-clause 20.6 as requiring a rehearing of a dispute on the merits, contemplating a single arbitration where all the existing differences between the parties arising from the DAB decision concerned will be resolved and had failed to appreciate that, as PGN had referred to sub-clause 20.6 as a defence and not as a counterclaim, the arbitral tribunal was without power to grant PGN affirmative relief under that sub-clause (iv) The CA misinterpreted the effects of the Award". C R Seppala, 'How Not To Interpret The FIDIC Disputes Clause: The Singapore Court of Appeal Judgment in Persero' (2012) The International Construction Law Review, Volume 29, Part 1

seen if the UAE Courts would enforce a DAB decision as prescribed by FIDIC, and under similar circumstance to the *Persero* case[261].

2.12.5. Expiry of the Dispute Board:

"The term of a standing DAB expires upon the Contractor's submission of a written discharge in accordance with the Contract, which confirms all disputes have been resolved".[262] Under Sub-Clause 20.8[263] if there is no DAB in place in connection with the Contract "whether by the reason of the expiry of the DABs appointment or otherwise" the dispute should be directly referred to Sub-Clause 20.6 and Sub-Clause 20.4, Sub-Clause 20.5 shall not apply.

What if the parties fail to move forward with forming or appointing the DAB, would Sub-Clause 20.8 provide the opportunity for either party unwilling to participate in the DAB process the chance to refer the dispute directly to arbitration? The drafting of Sub-Clause 20.8 may be seen as a perceived flaw of FIDIC 1999. However, under English Law where the contract provides for a standing or ad-hoc DAB the obligation to refer a dispute to a DAB is therefore a mandatory one, refer to *Peterborough City Council*[264]. Where a FIDIC contract

---

[261] Would the UAE Courts contemplate "an interim arbitral award regarding the DAB decision, whilst the main arbitral proceedings relating to the underlying dispute and subsequent challenge to the DAB decision remain undecided". D O'Leary, 'Using Dispute Adjudication Boards to Resolve Construction Disputes' http://www.tamimi.com/en/magazine/law-update/section-14/february-8/using-dispute-adjudication-boards-to-resolve-construction-disputes.html accessed 30 September 2017

[262] P Taplin and G Atherton, 'Will Hindsight Promote the Case for Dispute Adjudication Boards?' (2014) Adjudication Society Newsletter DAB members serving on ad-hoc DAB are only appointed once the dispute has arisen, and the appointment expires once the dispute has been resolved. Under the FIDIC Yellow Book the DAB member's appointment expires once the DAB has given its decision, unless there are other disputes referred to the DAB before the original decision is given.

[263] FIDIC 1999 Red Book Sub-Clause 20.8 [Expiry of Dispute Adjudication Board's Appointment]

[264] *Peterborough City Council V Enterprise Managed Services Ltd* [2014] EWHC 3193 Contract was under FIDIC Silver Book, for the design, supply, installation and testing and commissioning of a 1.5 MW solar energy plant, a term of the contract provided that the solar energy plant should produce a minimum of 55kW by a specified date, failing which LD's would apply. The contract provided that disputes were to be referred to the DAB, who would issue a final and binding decision provided a notice of dissatisfaction was not given. The final recourse for dispute resolution after the DAB decision was through the courts rather than arbitration. In July, 2014 the Contractor (EMS) gave notice of its intension to refer a dispute to a DAB, even though no DAB had been established. In August, 2014 EMS applied for the appointment of a DAB.
The Employer ignored the DAB provisions and proceeded to court during August, 2014, the Contractor then applied for a stay of the court action, based on the grounds that the parties needed to follow the contractual DAB provisions. The Employer resisted on the following grounds. (1) The DAB provisions were unenforceable, this argument was rejected by the court, because subsequent recourse was to the courts. (2) Because it was ad-hoc there was no DAB in place when the dispute arose, this argument was also rejected because of Sub-Clause 20.8 which provided for an optional ad-hoc DAB. "Sub-Clause 20.8 would only apply to give Peterborough a unilateral right to opt out of the DAB adjudication if the parties had agreed to appoint a standing DAB at the outset, as Sub-Clause 20.2 provided for ad-hoc appointments". Therefore, the argument put forward by EMS

provided for an ad-hoc DAB as a prerequisite to ligation, the court held that if such clause is retained in a contract, it would not permit the parties to 'opt out' as "Clause 20.8 was intended to apply to situations in which a full-term DAB has been appointed".[265]

The Judge held that "Sub-clause 20.8 was intended to apply to those situations where a 'standing' DAB had been convened, but had, by the time of the dispute, ceased to be in place for some reason, it did not confer a unilateral right on a party to opt out of the adjudication provisions".[266] Under Sub-Clause 20.8 "the reference to '**or otherwise**' seems to make it clear that if one party's intransigence means that a DAB is not appointed, the other party can then proceed straight to arbitration".[267] This position is supported by the FIDIC Contract Guide[268].

In another recent international case[269] the Swiss Supreme Court ruled that the parties are not allowed to bypass the DAB mechanisms and that the DAB process is mandatory. In this case

---

that the Contract required determination of the dispute through the DAB prior to litigation was accepted by the Court". (3) The DAB process was pointless in the context of the particular contract, was also rejected by the court because the parties had to follow the dispute resolution provisions agreed to in the contract.

[265] L Sellers, 'FIDIC's dispute adjudication boards: a guide to their use in the UAE' (2015) http://www.elexica.com/en/legal-topics/construction/21-fidics-dispute-adjudication-boards-a-guide-to-their-use-in-the-uae accessed 03 August 2017

[266] A Albertini and R Chaplin**, '**The Role Of Dispute Adjudication Boards Under FIDIC: A View From The Courts' (2014) http://www.mondaq.com/x/356714/Contract+Law/The+Role+Of+Dispute+Adjudication+Boards+Under+FIDIC+A+View+From+The+Courts accessed 25 August 2017

[267] M Goodrich, 'Dispute Adjudication Boards: Are they the future of dispute resolution?' (2016) https://www.whitecase.com/publications/article/dispute-adjudication-boards-are-they-future-dispute-resolution accessed 30 July 2017

[268] The FIDIC Contract Guide noted with respect to Sub-Clause 20.8 that a DAB may not be in place due to "party intransigence", however, the FIDIC General Conditions do not set a time limit as to when the DAB should be constituted. This would be an argument against the mandatory nature of referring the dispute to the DAB before commencing arbitration. J Glover, 'FIDIC Dispute Adjudication Boards' https://www.fenwickelliott.com/research-insight/articles-papers/contract-issues/fidic-dispute-adjudication-boards accessed 19 September 2017

[269] 4A_124/2014 - The parties entered into a FIDIC Red Book Contract in 2006, for road rehabilitation works in Romania. A dispute was referred to the DAB in March, 2011 and both parties appointed their adjudicators by May, 2011. The DAB Agreement between the parties was not agreed and there were a number of issues, such as conflict of interests in the appointment of the DAB chairman, this continued until July, 2012 almost 15 months after the dispute was first referred. The Contractor filed for Arbitration with the ICC during July, 2012. During September, 2012 the prospective DAB chairmen circulated a draft Dispute Adjudication Agreement, which the Employer suggested some changes be made to during October, 2012. The Contractor in writing refused to sign the DAB Agreement because 18 months had passed since the dispute was initially referred, and arbitration proceedings had already being initiated. The Employer challenged the jurisdiction of the Arbitration Tribunal, claiming the Contractor had not followed the Contract DAB procedures.
The Arbitration Tribunal held that the DAB procedure under Sub-Clause 20 FIDIC form was "not mandatory in that it would be a pre-condition to the right to initiate arbitration or that failure to observe it would lead to inadmissibility". The Tribunal also noted that FIDIC General Conditions do not set a time limit to form the DAB, which would argue against the mandatory nature of the DAB before initiating arbitration based on a number of points. (1) Sub-Clause 20.4 states "either party may refer the dispute in writing to the DAB for its

the Arbitration Tribunal ruled that the DAB procedures as outlined under Sub-Clause 20 of FIDIC was not a mandatory pre-condition to commence arbitration proceedings, for the following reasons: The word '**shall**' under Sub-Clause 20.2 should not be read in isolation, but in the wider context of the dispute resolution mechanism established under clause 20". Also, Sub-Clause 20.4 refers to the word '**may**' which could suggest that the DAB is only an option for each party to refer a dispute to.

The two cases are slight different in that the Swiss case the Employer frustrated the formation of the DAB and arbitration tribunal, while in the Peterborough case the Employer wanted to bypass the DAB and go straight to litigation. However, the decision from both jurisdictions was that the DAB procedures shall be treated as mandatory, and condition precedent to arbitration[270].

decision", suggesting that the DAB procedure is just an option available to both parties. (2) Sub-Clause 20.4 also states that no party can submit a request for arbitration without first giving a notice of dissatisfaction on receiving the DABs decision, except as stated under Sub-Clause 20.7 and 20.8, Sub-Clause 20.8 would allow direct recourse to arbitration without having to meet the DAB requirements.
However, the Employer filed to have the award set aside in the Swiss Courts, the Court held that, the DAB must be operational and an agreed Dispute Adjudication Agreement is in place. The Swiss Court looked at the general rules on the interpretation of the contract, and the common intent of the parties. The Court stated that the DAB was mandatory, but it also took into account the breach of good faith from the Employer in delaying the formation of the DAB. The Dispute Adjudication Agreement only comes into force when all parties have signed it, until it is signed there is no validly constituted DAB, in this respect the arbitral tribunal was correct, there was no DAB in place. The Employer could not argue on the mandatory nature of the DAB procedure as it had done so much to frustrate it in the first place.

[270] "If you don't comply promptly with the DAB's decision you will be in breach, there will then be another dispute for failure to comply with the DAB's decision. The party trying to enforce the DAB's decision could go to court and enforce the DAB decision as a debt, this is unlikely to happen because there is Arbitration sub-clause, unless you had a sophisticated court who understands adjudication and what it is. If you go to Arbitration you need to review the whole dispute again and seek an interim award, this also creates a problem, as was seen in the Singapore case which dragged on forever. In reality the Arbitrator should award the money, the Contractor holds the capital, if the Employer decides not to pay the dispute goes on and on. FIDIC are trying to introduce new wording in the revised FIDIC Contracts to be issued in December, 2017 which will say that DAB decisions which are not acknowledged by one party can be referred straight to Arbitration and payment to be made on a summary basis". Interviewee D – Code reference: 34 to 38

2.12.6. Referring the DABs Decision to Arbitration:

Sub-Clause 20.4 states "The DAB shall be deemed to be not acting as arbitrator(s)"[271]. Under Sub-Clause 20.6 if the DABs decision has not become '**final and binding**' it shall be settled by international arbitration[272]. Therefore, as already discussed before a dispute can be subject to arbitration it must be referred to the DAB, the question the arbitral tribunal must consider is "has the non-payment of the DABs decision been referred to the DAB specifically, and if not, does the arbitral tribunal have the jurisdiction to deal with the dispute".[273] The ICC arbitration have addressed the perceived gap issue in Sub-Clause 20.7, in the ICC case 16119/GZ[274], 10619[275] and 15751/JHN the tribunal considered it had the power to issue interim or partial awards. However, the ICC arbitral tribunal declined to issue interim or partial awards based on the DABs decision which are binding but not final, refer to ICC case 11813/DK and 16949/GZ[276].

The ICC rulings seem to indicate that parties who fail to comply with the DAB provisions under their contract will find the arbitral tribunal unsympathetic to their non-compliance, and will seek to enforce the DAB decision in the arbitration by partial or interim awards being made (subject to the arbitral tribunal power to review and revise the DAB decision at a later date). In summary the tribunal could make an interim award for payment based on the DABs decision. However, when the contract is governed by UAE law, reference needs to be made

[271] "The purpose of this express reference is to make it clear that the written decision of the DAB is not to be treated as an arbitrator's award, and so cannot be said to be immediately finally conclusive, neither will the DABs decision enjoy the status of an arbitrator's award in respect of enforcement". N Gould, 'Recent Developments: domestic and international' (2004) 10th Adjudication Update Seminar

[272] "Unless settled amicably, any dispute in respect of which the DABs decision (if any) has not become final and binding shall be settled by International arbitration."

[273] A Tweeddale, 'FIDIC's Guidance Memorandum to users – a half-baked solution?' (2014) Construction Law International, Volume 9 Issue 2

[274] ICC *Case 16119/GZ* "suggests that a partial final award and consequently also a final award are inappropriate devices to allow enforcement but suggests, obiter, that an interim award might be effective". T Dedezade, 'Are 'binding' DAB decisions enforceable? (2011) Construction Law International, Volume 6, Issue 3

[275] "Under FIDIC 1987 Red Book, Clause 67 the arbitral tribunal granted an interim award in favour of the claimant that was seeking to enforce an Engineer's decision awarding them money". G Di Folco and M Tiggeman, 'Enforcement of a DAB Decision Through an ICC Final Partial Award' (2010) The Dispute Board Federation, Issue 59

[276] ICC *Case 16949/GZ* "The sole arbitrator declined to make a final award (the merits were not in front of him) on the basis that 'though non-compliance with the DAB decision would amount to a breach of contract, the consequences of such breach would hardly be a claim for damages of the same amount already awarded". T Dedezade, 'Are 'binding' DAB decisions enforceable? (2011) Construction Law International, Volume 6, Issue

to the UAE Civil Code, Article 265[277]. If the UAE Courts interpret the phrase '**or otherwise**' under Sub-Clause 20.8 as clear, then it could be held that the DAB process is mandatory under UAE Law when the FIDIC contract is not amended. Conversely, if the UAE Courts view Sub-Clause 20.8 as unclear as in consideration of Article 265 it would then be important to identify if whether the parties had expressed particular intent at the time of forming the contract. The UAE courts are "likely to uphold FIDIC's pre-conditions to arbitrate if, that is, the DAB provision has not been struck out".[278]

2.13. DABs in the UAE:

DABs are not new concept to the UAE or wider Middle East, as the FIDIC Rainbow suite of contracts are the most commonly used form of contract throughout the region. However, adjudication as provided for in standard FIDIC Contracts has not found much traction, nor have Governments or the judicatory enacted any statutory legislation which would give a mandatory right of adjudication in construction disputes. "The use of DABs in the UAE has been conspicuous in its absence, instead of adopting what should be considered as a proactive approach to dealing with disputes, it is more likely that Employers will delete the FIDIC 1999 DAB clauses, preferring instead to rely on the arbitral process, or the Courts, to settle any disputes".[279] There is resistance to DABs in the UAE for a number of reasons, which shall be discussed under Chapters 4 and 5. The use of DABs may be seen by the UAE Employer as just another expensive layer of administration adding to the project costs, with the process offering no guarantee of a final and binding award.

Nonetheless, the UAE has attempted to promote the use of DABs, Law Number 21 of 2006 as passed by the Abu Dhabi Government provided for "the standardization of the

[277] UAE Civil Transaction Code, Law # 5 of 1985, Article 265 (1) "If the wording of a contract is clear, it is not to be departed from by way of interpretation to ascertain the intention of the parties". (2) "If there is scope for an interpretative construction of the contract, an enquiry shall be made into the mutual intentions of the parties beyond the literal meanings of the words, and guidance may be sought in so doing from the nature of the transaction, and the trust and confidence which should exist between the parties in accordance with the custom current in (such) dealings". So if Sub-clause 20.8 is unclear then Article 265 will not resolve the issue "unless the parties had expressed any particular intent at the time the contract was formed". A Bell, J Witt and N Hall, 'Dispute Adjudication Boards' (2014) http://www.arabianindustry.com/construction/news/2014/dec/4/dispute-adjudication-boards-4894760/ accessed 31 July 2017

[278] D O'Leary, 'Using Dispute Adjudication Boards to Resolve Construction Disputes' http://www.tamimi.com/en/magazine/law-update/section-14/february-8/using-dispute-adjudication-boards-to-resolve-construction-disputes.html accessed 30 September 2017

[279] P Taplin and G Atherton, 'Will Hindsight Promote the Case for Dispute Adjudication Boards?' (2014) Adjudication Society Newsletter

construction contracts for the projects initiated by the government entities".[280] The Abu Dhabi government in 2007 under the licence from FIDIC created two bespoke forms of contract (Build only and D&B) which were specially modified forms of FIDIC municipality construction contract to be used on all government contracts in the Emirate of Abu Dhabi. The Abu Dhabi government contracts contain a provision for DAB under Sub-Clause 20.4, however, they removed the standing DAB and replaced it with an ad-hoc, thus removing the dispute avoidance function of the Clause, there were some amendments to the standard FIDIC sub-clauses[281].

2.14. Conclusion:

It could also be argued that disputes in construction contracts are inevitable due to the number of interested parties involved in the process of designing, constructing and financing a project. However, the main function of the DAB is dispute avoidance, rather than dispute resolution, it is therefore important that a standing DAB is appointed once the project commences so as to obtain the true benefit of the DAB, ad-hoc DABs do not provide a dispute avoidance function.

The introduction and development of DABs by FIDIC has provided the parties to a construction contract with an alternative to arbitration as a method of dispute resolution. The reputation arbitration has gained of being a time consuming and costly procedure is impacting its reputation as a viable option to resolve construction disputes. There are now viable ADR methods available in the market, parties in the UAE now need to consider other options such as DABs, which are considerably less expensive and time consuming compared to arbitration and litigation and would promote a culture of dispute avoidance. However, to date DABs have not found much traction in the UAE, apart from the Abu Dhabi government contract, which has only provided for an ad-hoc DAB. There needs to be a cultural shift in the mind-set of all parties involved in the UAE construction industry if DABs are to gain any

[280] Z Rizvi, 'FIDIC in the Middle East - The Must Know for Industry Players' **https://www.lexology.com/library/detail.aspx?g=beeb6477-d429-4864-add4-57ea6f5c0197** accessed 28 September 2017

[281] (i) Sub-Clause 20.1 was amended so that the Employer deals with the Contractor's claims and not the Engineer. (ii) Sub-Clause 20.4 the DAB has 42 days instead of 84 to give a decision, the period can be extended on the agreement of both parties. (iii) Sub-Clause 20.5 provides for amicable settlement, which involves senior representatives of the parties into the dispute. (iv) Sub-Clause 20.6 provides for a further 30 day cooling off period to try and resolve the dispute rather than resort to arbitration, which would be under ADCCAC rules.

traction in the region, this will require input from the federal government, judicatory, local construction bodies and experts in DAB procedures and rules.

The major concern of any dispute resolution method is the enforcement of the award, the UAE is unlikely to adopted any form of statutory adjudication legislation in the short to medium term (the time taken to introduce the UAE Arbitration Act shows there is no real appetite to reform and improve existing legislation). However, it is still unclear how the UAE Courts would treat the enforcement of the DABs decision, this prompts the obvious question, as the UAE construction industry matures, and projects become ever more technically complex, with shorter programme durations and more commercial scrutiny from experienced UAE Employers and Contractors of project cost, is the time now right for construction professional to embrace the implementation of DABs as a mechanism to resolve disputes? The following chapters shall attempt to answer this question.

CHAPTER THREE

Research Methodology

3.1. Introduction:

In Chapter two there was a comprehensive review of the relevant international and where applicable UAE or ME specific literature with regards DABs. The literature review identified that there is limited academic commentary on the application of DAB procedures within the UAE. The aims and objectives of this study were identified in Chapter one, this Chapter will introduce the research methodology adopted in order to complement existing literature and develop arguments through the collection and analysis of the relevant empirical data used[282]. The intension is to illustrate through the selected research methods the opinions and views of construction professionals in the UAE in order to achieve valid, reliable and well-reasoned conclusion with logical references to the aims and objectives of the study.

3.2. Selected Research Methodology:

In view of the literature research undertaken there is international consensus that when standing DABs are utilised to their full potential there is a significant reduction in the number of disputes finally referred to arbitration. Unfortunately, in the UAE and greater ME region there has been a limited adoption of the FIDIC 1999 DAB contractual provisions (with the exception of the Abu Dhabi government contracts ad-hoc DAB provisions). There is ample data relating to construction dispute causes, cost and resolution in the UAE, with a focus mainly on arbitration and litigation. However, there is limited available data available on dispute avoidance or the application of various ADR methods in the UAE, specifically DABs.

Research strategies were defined by Biggam[283] and Freimuth[284], while Creswell and Clark[285] distinguished between deductive and inductive research. The two main types of research

[282] Empirical data is research based on observation, evidence or experimentation, the hypothesis of the argument can be tested by evidence. "In philosophical terms, empirical data is often defined as data which is collected through the use of our senses". P Oliver, *Writing Your Thesis* (1st edn, Sage Publications, London 2004)

[283] "The research strategy refers to your over-arching approach to your empirical research, and there are a number of tried and tested strategies to choose from, examples of which include: case study, survey, ethnographic, experimental, historical, action research and grounded theory, you must identify your research strategy, describe it and explain why it is appropriate to your research". J Biggam, *Succeeding with your Master's Dissertation* (1st edn, Open University Press, UK 2008)

[284] K Rudestam and E R. Newton, *Surviving Your Dissertation* (2nd edn, Sage Publications, London 2001) cited M Freimuth "The three-level hierarchy of knowledge are "(i) Axiologic/Epistemic level – forms the foundation for content and method within a field of inquiry (ii) Theoretical level – theories are premises to account for data (iii) Empirical level".

analysis used are quantitative[286] or qualitative[287], for the purpose of this dissertation both qualitative research (inductive) and doctrinal research[288] were used. Sweetman[289], describes the functions of the literature review, which lays the foundations of the research by using primary and secondary sources of information to illustrate the data collection under the literature review. The qualitative methods adopted comprised of interviews (semi-structured and unstructured) and an on-line surveys with text and visual data analysis. If interviews and survey are applied correctly they can obtain large volumes of relevant data in a relatively short period of time.

3.3. Analysis of Questionnaire Responses:

A sampling[290] methodology was adopted, which involved the design and distribution of an online questionnaire during October/November, 2017. Naoum[291] describes the stages in the construction of a questionnaire, the questions were focused on obtaining specific information with regards the aims and objectives of the study. The structure of the questionnaire was simple, direct, clearly drafted and followed a logical sequence which was appropriate to the target UAE construction industry professionals. The objectives of the questionnaire was to

---

[285] J W. Creswell and V L. Plaro Clark, *Designing and Conducting Mixed Method Research* (2nd edn, Sage Publications, London 2011) Deductive research "works from the 'top down', from a theory to hypotheses to data to add to or contradict the theory". Inductive research is defined as "bottom-up, using the participants' views to build broader themes and generate a theory interconnecting the themes". Quantitative research is deductive and qualitative research is inductive.

[286] "Quantitative research isolates and defines variables and variable categories, these variables are linked together to form a hypotheses which is then tested on the data". J Brannen, *Mixing Methods: Qualitative and Quantitative Research* (1st edn, Routledge, New York 2016)

[287] "Qualitative research begins with defining very general concepts, which as the research progresses may change the outcome". J Brannen, *Mixing Methods: Qualitative and Quantitative Research* (1st edn, Routledge, New York 2016)

[288] "Doctrinal research is research into the law and legal concepts, it is research which provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and, perhaps, predicts future developments". T C. Hutchinson, 'Developing Legal Research Skills: Expanding the Paradigm' (2008) Melbourne University Law Review, 32.

[289] The literature review has a number of functions "(i) It shows that you have read widely around your chosen topic (ii) It demonstrates your critical understanding of the theory (iii) It acknowledges the work of others (iv) It informs and modifies your own research". D Swetman, *Writing your Dissertation* (3rd edn, how to books, UK 2005)

[290] "Sampling is basically the obtaining of a manageable part of the object or population that supposedly possesses the same qualities as the whole". The sample should be large enough to be significant, representative as possible, defects acknowledged and the rational for it produced. D Swetman, *Writing your Dissertation* (3rd edn, how to books, UK 2005)

[291] There are three fundamental stages that you should take in constructing your questionnaire: "(i) Identifying the first thought questions (ii) Formulating the final questionnaire (iii) Wording of questions". In addition the following should also be considered "(i) Which objective is the question related to (ii) Is the question relevant to the aim of the study (iii) Is the question relevant to the research hypothesis (iv) Can the answer be obtained from other sources". S G. Naoum, *Dissertation Research and Writing for Construction Students* (3rd edn, Routledge, New York 2013)

determine if respondents were aware of DABs and would they welcome DABs as the primary method of dispute resolution on construction projects in the UAE. The questionnaire consisted of fifteen multiple choice questions, which were close ended questions with unordered choices[292]. However, the participants were given the option of 'other' and 'comment' boxes were also provided under select questions, so as to allow participants develop their replies, this approach was taken so as to maximize the number of respondents.

As identified by Hoxley[293], response rates to online questionnaires are generally low, the response rate for this study was over 40% with 177 individual responses. The questionnaire was distributed to a wide circle of construction professionals in the UAE who would have had experience of claims, disputes and dispute resolution methods under numerous construction contracts. The questionnaire was distributed on-line through the surveymonkey platform, with a brief description of the overall purpose of the research. The average completion time was approximately five minutes per respondent.

3.4. Semi-Structured Interviews:

Primary data for this dissertation was gathered by utilizing both qualitative and quantitative research in the guise of un-structured and in-depth semi-structured interviews. In order to identify a broad range of views on DABs, it was deemed appropriate to conduct an in-depth interview with a number of influential professionals currently working in the UAE Construction industry. The interviews also sought to examine the many views concerning the attitudes the interviewees had in relation to the overall state of the UAE Construction industry, construction claims/disputes and the effectiveness of DABs to avoid and resolve disputes.

A total number of six structured/semi-structured interviews[294] were conducted between October and November, 2017 participants were contacted through the authors existing

[292] The respondents were asked to evaluate each choice and select the one that best reflected their opinions, there was also an option to give comment if required.
[293] A Knight and L Rudduck, *Advanced Research Methods in the Built Environment* (1st edn, Blackwell Publishing, UK 2008) cited M Hoxley "Typical response rates quoted in text books have a mean of about 30 per cent but one has to work hard to achieve this level of response".
[294] "A semi-structured interview is when you have an outline structure with key pointer questions, hoping to generate a fluid, dynamic interview, this give you the opportunity to confront core issues and at the same time allow the interview process to take unexpected twists and turns". This method can be compared to a structured

business network or direct contact was made by way of an introductory e-mail which outlined the University course for which the study was being conducted, a brief summary of the dissertation and the interview approach. The interviewees were requested to confirm their participation in the research.

Where possible all interviews were conducted face to face in the UAE, a number of interviews were completed via Skype. Initially all participants were e-mailed a list of predetermined questions a week before the interview, the objective of this was to give the interviewee an understanding of the structure of the dissertation and allow them prepare their answers accordingly. The interviews were recorded and the transcriptions were prepared using the coding method[295]. The method of key word coding for analysis of the interviews was chosen, because coding is a process of representing the operations by which data is broken down and put back together in new ways.

Interviews were qualitative rather than a quantitative, with open ended questions, it was therefore important that the interviewer avoided influencing the participant responses, refer to King[296]. The interview questions were broken into categories based on the development of the topics identified and described under the literature review. The limited data available on DABs in the UAE allowed the author identify gaps in the existing research and direct and develop questions to give professional insight on these topics. Questions were initially grouped under headings relating to the aims and objectives of the study, the questions were then refined and developed so as to allow the interview follow a seamless transition from one topic to the next. A total of sixteen questions were addressed to the interviewees, with a number of sub questions for discussion which allowed for more detailed and expressive

---

interview where a pre-prepared set of questions are answered, this maintains a focused interview process. J Biggam, *Succeeding with your Master's Dissertation* (1st edn, Open University Press, UK 2008)

[295] "The reason for open ended questions is that the researcher has no clear hypothesis regarding answers, analysis of open ended answers requires coding, so as to reduce the responses to a few general categories of answers that can be assigned a numericial code". S G. Naoum, *Dissertation Research and Writing for Construction Students* (3rd edn, Routledge, New York 2013)

[296] A Knight and L Ruddock, *Advanced Research Methods in the Built Environment* (1st edn, Blackwell Publishing, UK 2008) cited A King who described a four-stage process of constructing and carrying out qualitative research interviews: "(i) define the questions (ii) create an interview guide that is a list of topics to be covered in the interview and a list of probes to elicit further details if required (iii) recruiting participants, including sample definition and criteria, and consideration of confidentiality (iv) carrying out and analysing the interviews, which addresses the practical issues associated with interviews, such as phrasing, starting and ending, and difficult interviewees".

opinion to be given. A mock interview (pilot study[297]) was conducted with a colleague in order to remove any unnecessary duplication of questions, refer to O'Leary[298]. All interviews were recorded and transcribed, so as to provide an accurate record of the discussion.

3.5. Ethical Concerns and Limitations:

There were concerns that the interview approach would result in a small sample size of opinion, for this reason the on-line questionnaire was used to complement the opinions of the interviewees backed up with relevant statistical data from a wider sample base in the UAE. As already identified there are a limited number of UAE projects where DABs have been utilised, and in addition to the confidential nature of the DABs decisions, it was for these reasons a case study approach could not be considered. A case study would have allowed the prospect to explore the reasons why disputes were referred to the DAB, identify contractual approaches to disputes, the DABs decisions, if the DABs decisions were referred to arbitration, and most importantly it would give the opportunity to identify the true value of DABs in terms of time and cost effectiveness.

Due to the highly regarded professional reputation of the interview participants within the UAE construction industry it was of paramount importance that any opinions expressed by the interviewees would remain confidential in relation to this particular study. All interviewees were provided with a draft of the final interview transcript to confirm its content was a true reflection of the opinions expressed in the interview. For the purpose of confidentiality the transcribed interviews shall not be made public.

[297] "The 'pilot study' involves testing the wording of the questions, avoiding ambiguous questions, suggestions for analysing the data, as well as testing the technique selected for collecting the data". S G. Naoum, *Dissertation Research and Writing for Construction Students* (3rd edn, Routledge, New York 2013)

[298] A Knight and L Ruddock, *Advanced Research Methods in the Built Environment* (1st edn, Blackwell Publishing, UK 2008) cited O'Leary who identified the "need to have a pilot interview before beginning a final interview schedule, which includes the need to gather feedback, reflect and where appropriate, modify the interview plan".

CHAPTER FOUR

Survey Findings

4.1. Introduction:

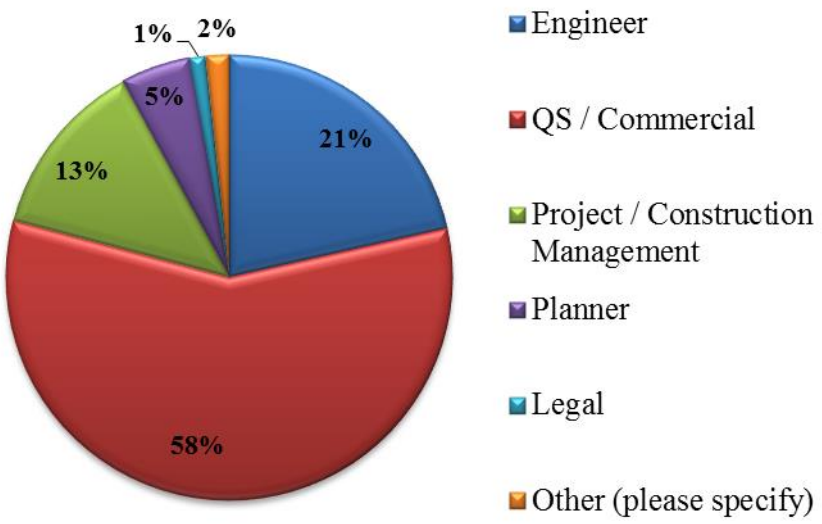
The emphasis of this chapter will be to present the results of the online survey and provide a detailed interpretation of the findings based on the aims and objectives of the dissertation. This chapter will draws upon data collected in the literature review, which will allow the identification of the key areas where analysis was required and was used as the basis of question development. The views of UAE construction professionals were sought for a number of specific issues, such as:

1. The challenges facing the industry at the moment,
2. The causes of construction related disputes,
3. Important aspects of resolving disputes,
4. The industries understanding of DABs, their advantages and disadvantages,
5. Statutory Adjudication,
6. Would construction professionals actually welcome the wider use of DABs as the main method of dispute resolution in the UAE.

The data collected from the online survey allows for critical evaluation and examination of the core subject matter of this dissertation and will also be discussed in more detail under chapter 5 (Discussion and Analysis). The UAE construction industry is a complex and competitive environment which draws professionals from varied backgrounds, Architects, Engineers, QS's, Planners, Lawyers etc… each profession will have its own view on how a construction contract should be administrated, for this reason the survey sought to get opinion from a wide spectrum of professionals across the industry, with over 177 individual responses the survey will give a reasonably accurate snapshot of how the UAE construction industry perceives DABs.

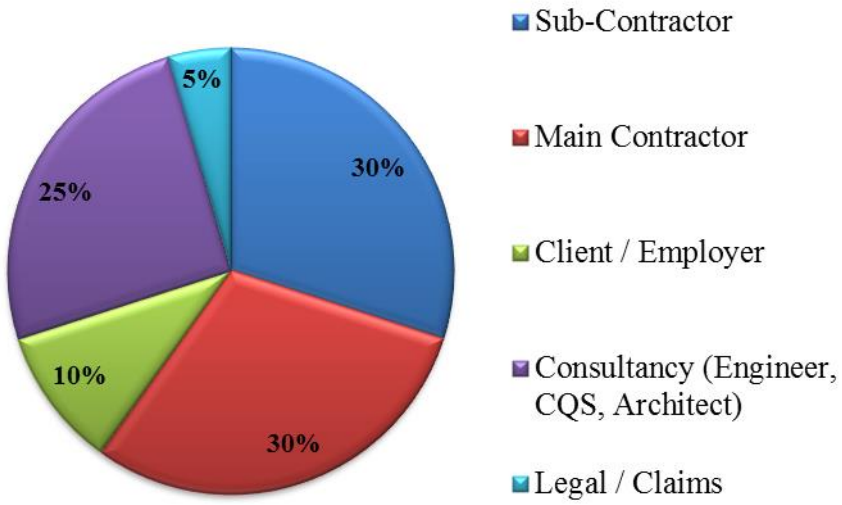
4.2 Survey Analysis:

Q1. What is your Professional background?



Although the survey was distributed to a wide circle of construction professional in the UAE the majority of participants were from a QS/commercial or engineering background. This was not surprising seeing as the majority of contract administrators in the UAE come from the QS/engineering professions. This question was asked so as to interpret and analyse the data and views of survey participants from different professional backgrounds.

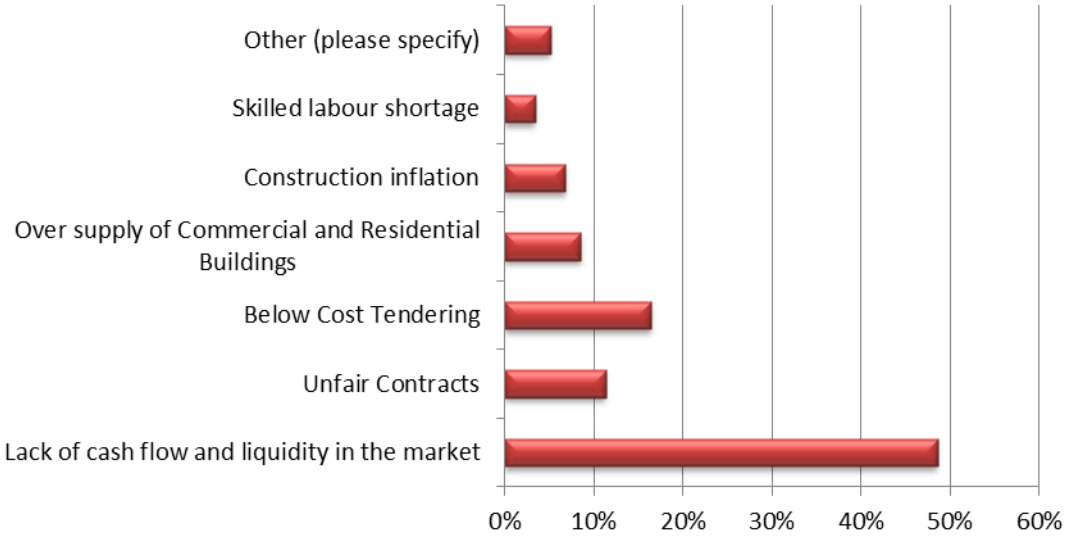
Q2. How would you categorise your current Company / Business?



The majority of respondents were working for a Main Contractor (31%) or Sub-Contractor (30%), the percentage breakdown of the survey participants would be a fair proportional

representation of the UAE construction industry at the moment. Again this question was asked so as to determine trends in the respondent's answers, with regards the opinions expressed, knowledge of DABs, and were such opinions significantly different depending on whether the participants were employed by the Contractor, Subcontractor, Client or a Consultancy (Engineer/CQS).

Q3. What would you say is the biggest challenge facing the UAE Construction Industry at present?



The survey identified that the lack of cash flow and liquidity in the UAE construction market was the biggest challenge at the moment. Cash flow is the lifeblood of the industry and the smallest of payment delays has the ability to disrupt and expose the entire supply chain to significant hardship. Constraints around cash flow, and non-payments for works done will result in harder attitudes towards entitlement, and undoubtedly will lead to more construction disputes, the impact of which will ultimately flow through the supply chain, as was expressed by a survey respondent[299].

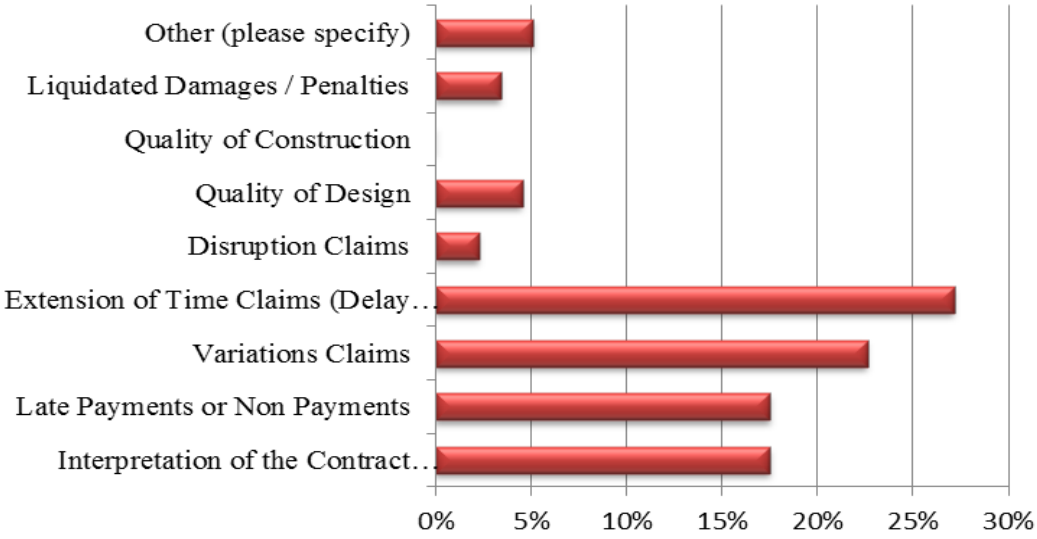
The second biggest challenge identified is below cost tendering[300], this trend is not sustainable in the long run and combined with the lack of liquidity in the market will also

[299] "The lack of cash flow combined with unfair contracts is the recipe of complete failure of any business system. There is an alarming imbalance between clients and contractors, coupled with the bias of contract administrators and Employer representatives passing onto the Contractor parts of their design obligations and not dealing with excusable delays and payment for varied works".

[300] "It is fairly common in times of economic depression for Contractors to buy their work by tendering at below cost and then trying to recover their economic losses as a 'total cost' claim, the essence of a 'total cost' claim is that the contractor tender cost is X and its cost to complete the contract is Y, and is therefore recoverable by

result in an increased volume of disputes. How will these potential disputes be resolved? Is arbitration the answer, is seems it may not be viable for many contractors/subcontractor in the UAE due to the associated cost and lost productivity now associated with arbitration. The initial objectives of arbitration could be summarised into five main objectives[301], how many of these objective are applicable to arbitration as we know it today.

Q4. In your opinion what is the most common cause of dispute encountered on UAE construction projects?



The construction industry is particularly prone to disputes, because "few construction projects are realised as planned and variations are the rule rather than the exception, whether the contractor is entitled to additional payments for changes often causes dispute, time schedules for completion are always tight and delays can lead to severe penalties".[302] As identified by the survey results the main source of disputes in the majority of construction projects are EOT (27%) and variation (23%) claims, which are sometimes not presented clearly by the Contractor or not evaluated/assessed by the Engineer/Employer in a fair and reasonable manner, this was also reflected in the survey. Following on from Question 3, late or non-

whatever they can muster by way of a claim". However, the claim does not take account of the contractors culpability for submitting the original render price below cost, just because costs exceeds revenue it does not give the contractor entitlement to recover losses. A Burr, *Delay and Disruption in Construction Contracts* (5th edn, Informa Law from Routledge, Oxon, 2016)

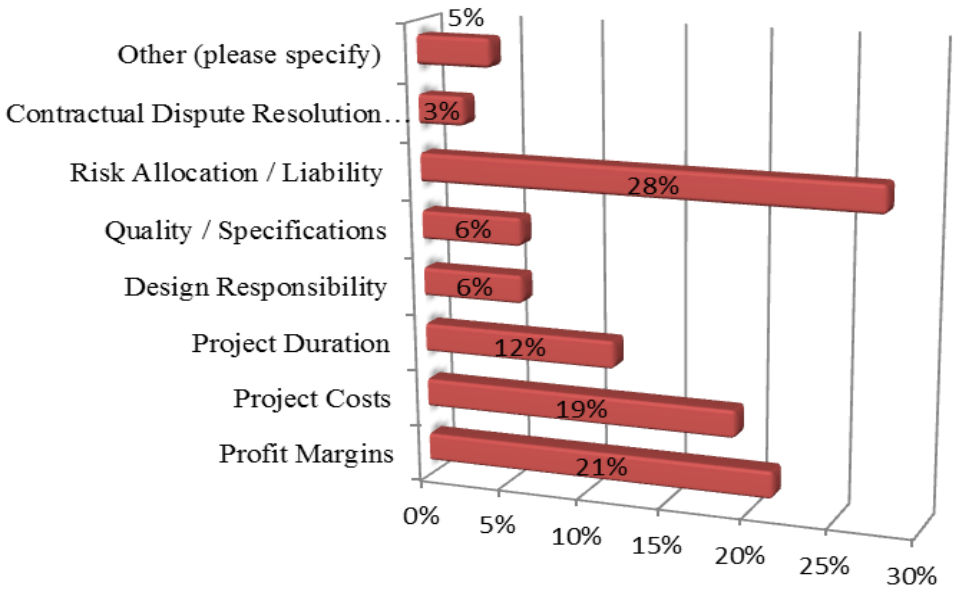
[301] English Arbitration Act (1996) objectives were "(i) To ensure that arbitration is fair, cost-effective and rapid (ii) To promote party autonomy (iii) To ensure that the courts have supportive powers at appropriate times (iv) To ensure that the language used is user friendly and readily accessible to the parties (v) To follow the model law wherever possible". N Gould, 'Conflict Avoidance and Dispute Resolution' (2012) RICS Professional Guidance UK GN 91/2012

[302] R Harbst and V Mahnken, 'ICC Dispute Board Rules: the Civil Law Perspective' (2006) 72 Arbitration 4

payments (17%) were identified as another source of dispute, this could also be linked to variation and EOT claims not being paid by Employer's.

There seems to be a reoccurring theme in the UAE of the same type of disputes being repeated on numerous projects, and it is not unusual to find the same parties in similar disputes on consecutive projects. It appears the UAE construction industry needs its own version of the Latham report, or something similar, so the inherent problems associated with construction in the UAE can be addressed at the highest level of government or at the very least within the industry itself.

Q5. What would be your primary concern when procuring / tendering for a construction project in the UAE?

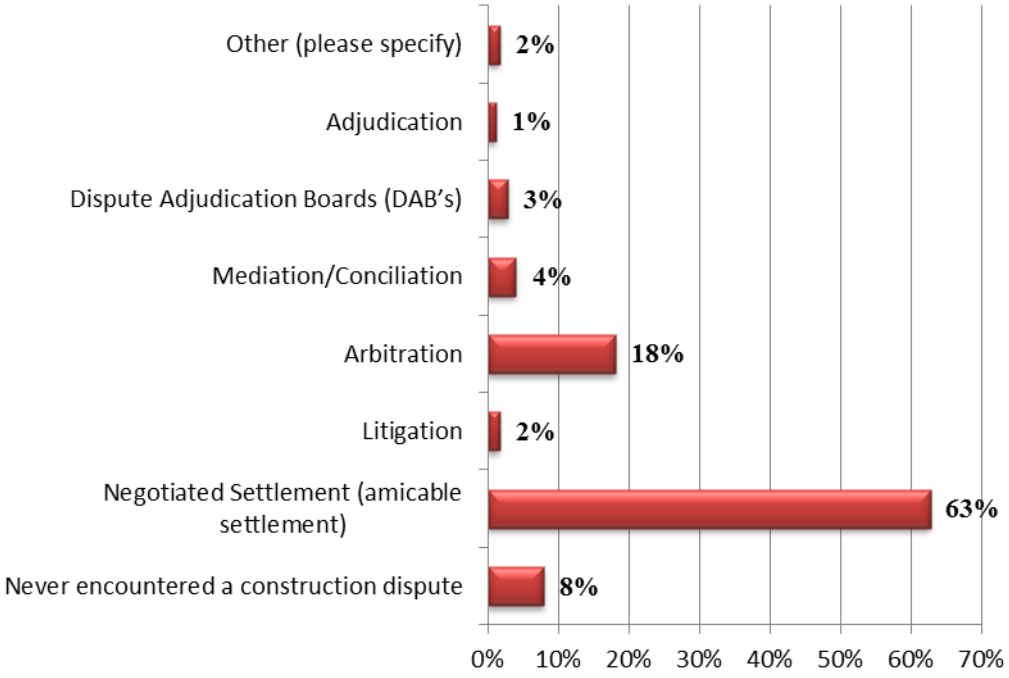


The survey identified that risk allocation and liability (28%) were the primary concerns when tendering or procuring a project in the UAE. In order to avoid or limit construction disputes there needs to be fair and appropriate allocation of risk within the contract, the drafting of the contract needs to be accurate and contracts need to be administrated in the sprit they were intended[303]. Project costs and profit margin were also a concern, as both are heavily influenced by the known and unknown risk allocated to the parties under the contract. Not surprisingly contractual dispute resolution was only considered a primary concern by 3% of

[303] "The substantive law of the contract will establish the ground rules for the interpretation of the contract and, in particular, its dispute resolution procedures". N Gould, 'Enforcing a Dispute Board's decision: Issues and Considerations' (2013)

respondents, this backs up the views of experts on construction law and dispute resolution that the parties to the contract pay little attention to the dispute resolution when tendering or procuring a construction contract. Correctly drafted dispute resolution sub-clause can streamline dispute resolution and reduce costs, the opposite applies if such sub-clauses are poorly drafted, and they could be unenforceable and lead to even further escalation of conflict between the parties.

Q6. What method of construction dispute resolution are you most familiar with?



The most common methods of dispute resolution in the Middle East in 2016 were:[304]

1. Party to Party negotiation
2. Arbitration
3. Adjudication

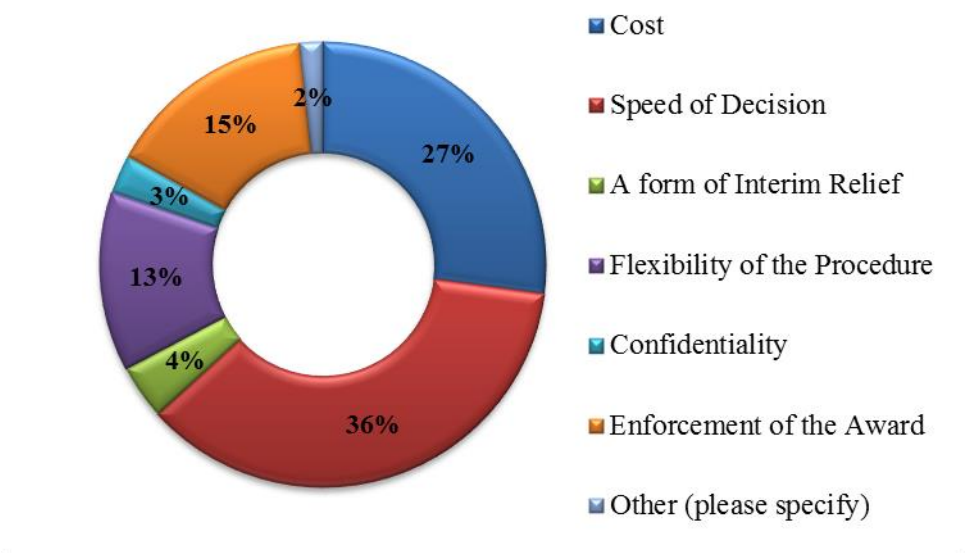
This was also reflected in the survey, with 63% stating that negotiated settlement is the most common method of dispute resolution encountered in the UAE, followed by arbitration. Amicable settlement generally takes the form of high level executive (CEO or GM) discussions and agreement, this form of dispute resolution will not involve the parties who were involved in the day to day intricacies of the project, thus removing any emotion from

[304] Global Construction Disputes Report (2017) Avoiding the same Pitfalls Arcadis https://images.arcadis.com/media/2/4/B/%7B24BB2290-3108-4A38-B441-E3C0B95FB298%7DGlobal_Construction_Disputes-2017.pdf accessed 15 October 2017

the discussion, which allows a wider corporate perspective of the actual dispute. Negotiated settlement can be effective and inexpensive if consultants and lawyers are removed from the process, the aim of the discussion should be to maintain continued business relationships.

The survey results indicate that respondents have not been exposed to DABs, this lack of exposure and awareness could be one of the reasons why the introduction of contractual DABs are not yet extensively utilised in the UAE.

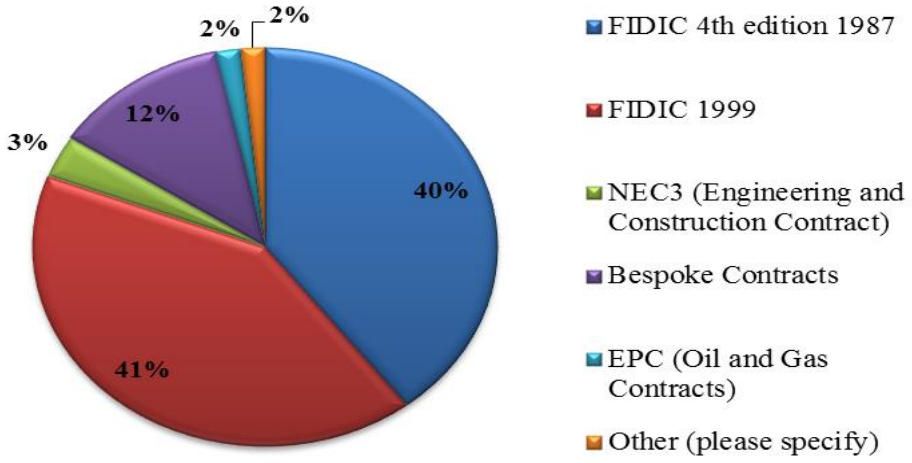
Q7. Which of the following would you consider the most important when seeking to resolve a construction dispute?



The survey respondents identified speed of decision (36%) as the most important when resolving a dispute, the second most important consideration was cost (27%), followed by flexibility of procedure. It could be argued from the research undertaken that DABs would certainly meet the criteria of what UAE construction professionals consider important when it comes to dispute resolution. DABs are a speedy process of dispute resolution (decision within 84 days of referral), according to DRBF costs of the DAB are between 0.05% of the construction costs on dispute free projects and 0.25% for more difficult projects[305], and the procedure is substantially more flexible when compared to arbitration or litigation[306].

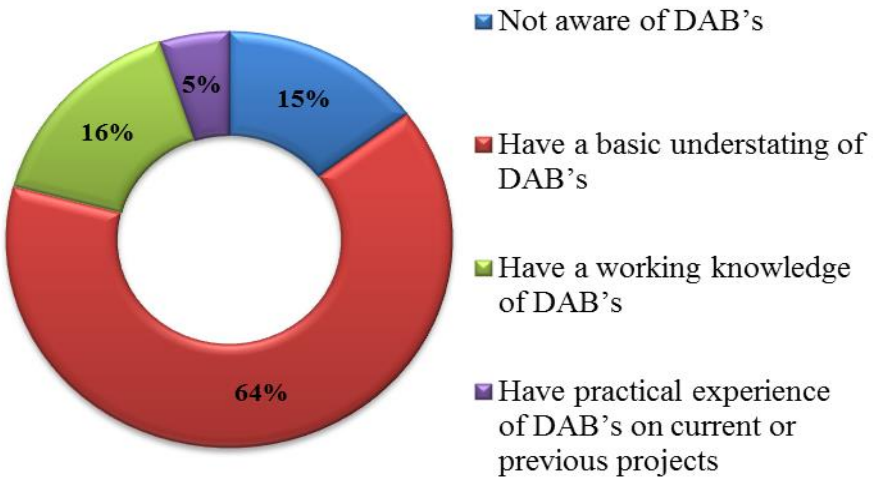
[305] Under FIDIC Sub-Clause 20.2 the DAB are remunerated equally by the parties, with both parties paying half the fees, which are monthly retainer fee or daily fee for site visit and specific involvement. The process of payment is that the DAB members will invoice the Contractor, who will then submit 50% of the invoice as part of the interim payment application, payment will become due to the DAB members within 56 days of the invoice submission. It is usual for the DAB members to propose their own fees, however, if the parties disagree on the fees, "a court assessment to determine the reasonableness of the fee would be conducted and it is unlikely the fee would be less than what was originally proposed by the member(s) of the DAB". L Sellers, 'FIDIC's

Q8. What form of Contract are you most familiar with in the UAE?



Over 81% of respondents have or are using FIDIC forms of contract, the FIDIC suite of contracts have been popular in the UAE and wider Middle East region since the 1970's, especially for public sector projects and with major developers. As was identified in chapter two the DAB provisions are generally deleted from the conditions of contract by UAE Employers, and the whole essence of dispute avoidance is removed, thus depriving both parties of a proven method of dispute resolution, which is time efficient and cost effective.

Q9. How would you rate your understanding of FIDIC 1999 Dispute Adjudication Board (DAB) procedures?

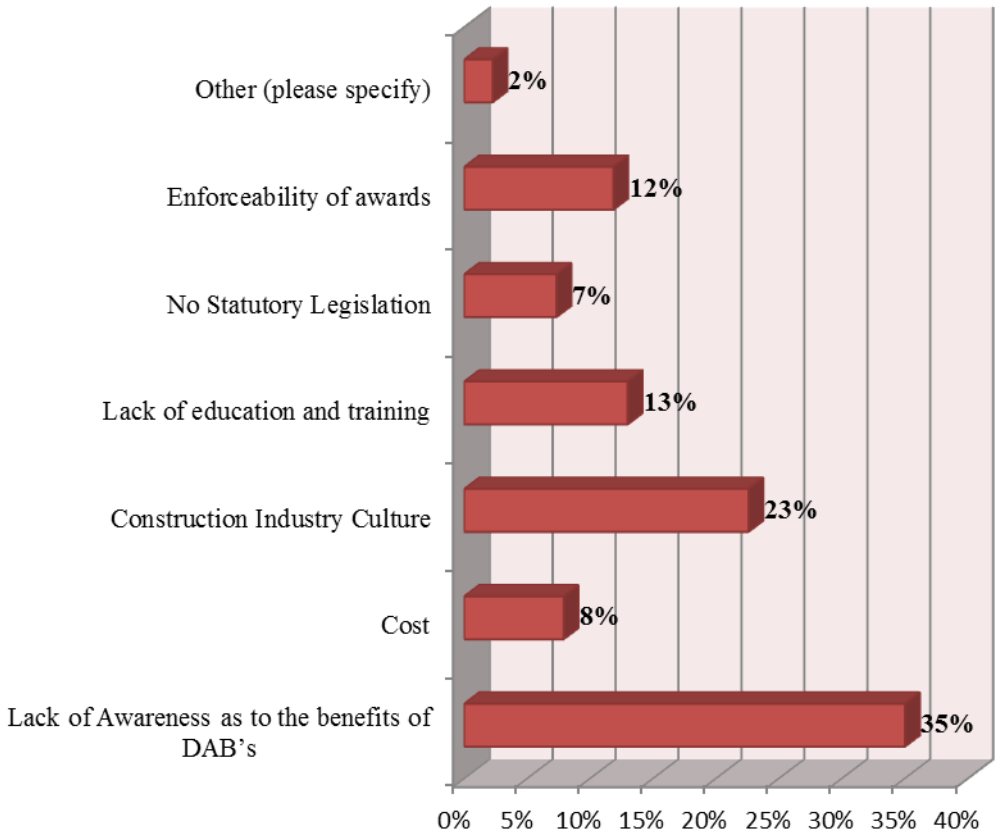


dispute adjudication boards: a guide to their use in the UAE' (2015) http://www.elexica.com/en/legal-topics/construction/21-fidics-dispute-adjudication-boards-a-guide-to-their-use-in-the-uae accessed 21 September 2017

[306] The success of the DAB depends on the parties having a clear understanding of the DAB procedures and process under the contract. The process is not suitable for parties that want rule-oriented final decision, the board's decisions are not binding precedents on the parties.

As was seen in Question 8 over 81% of respondents are familiar with FIDIC forms of contract. However, only 21% have a working knowledge or practical experience with DABs (some respondents stated that their experience of DABs was outside the UAE). Only 15% of respondents stated they had no understanding of DABs, the vast majority of these respondents were working as a subcontractor. The survey shows there is awareness of DABs but only 21% understand the procedures and process, the result is not surprising considering that DABs have not penetrated the UAE construction industry as successfully as in other jurisdictions around the world.

Q10. Why do you think DABs are not widely utilised in the UAE?



The majority of respondent believe lack of awareness (35%), construction industry culture (23%) and lack of education and training (13%) to be the major blockers to DABs in the UAE. As can be seen with Question 6 and 9 there seems to be a lack of awareness amongst UAE construction professionals, DABs are not being promoted as an alternative in the UAE,

this is something the industry as a whole needs to address[307]. Professional bodies in the UAE such as the RICS, CIArb, CIOB maybe should be doing more to promote ADR methods, but they alone cannot drive change, there needs to be paradigm shift across the entire industry, from Employer's to Contractor's, and down the supply chain. As 23% of respondents alluded to the culture of the UAE construction industry is not willing to embrace change, for reasons identified by a survey participant[308]. In order for the concept of DABs to be accepted there needs to be a significant change in attitudes, as Gerber quoted[309].

There are only a select number of construction professional who have served as a DAB member in the UAE, mainly due to the fact DABs are rarely used in the region, but this is not to say there is an absence of amply qualified construction professionals in the UAE who could serve as board members[310]. Bodies such as Dispute Boards MENA[311] do provide DAB services in the UAE and wider ME region. Contrary, to the contemporary literature only 8% of the survey participants identified 'cost' as a blocker to DABs in the UAE, as was referenced under Question 7 the cost/fees[312] of the DAB as a standalone dispute avoidance/resolution is the most cost effective way to for an independent third party to resolve disputes in a timely manner.

[307] "Only once the parties develop such as understanding can they appreciate why dispute boards are focused on the contemporaneous resolution of disputes in a harmonious way that preserves positive working relationships between the parties". C Chern and C Koch, 'Efficient Dispute Resolution in the Maritime Construction Industry Dispute Boards in Maritime Construction' (2005)

[308] "Employer's do not want to use them (DABs) because many decisions will go against the Employer's due to design being incomplete. Employers and Contractors do not want to pay the up-front costs of a standing DAB because they are not fully aware of the benefits of DABs and they are trying to keep costs down due to low profit margins".

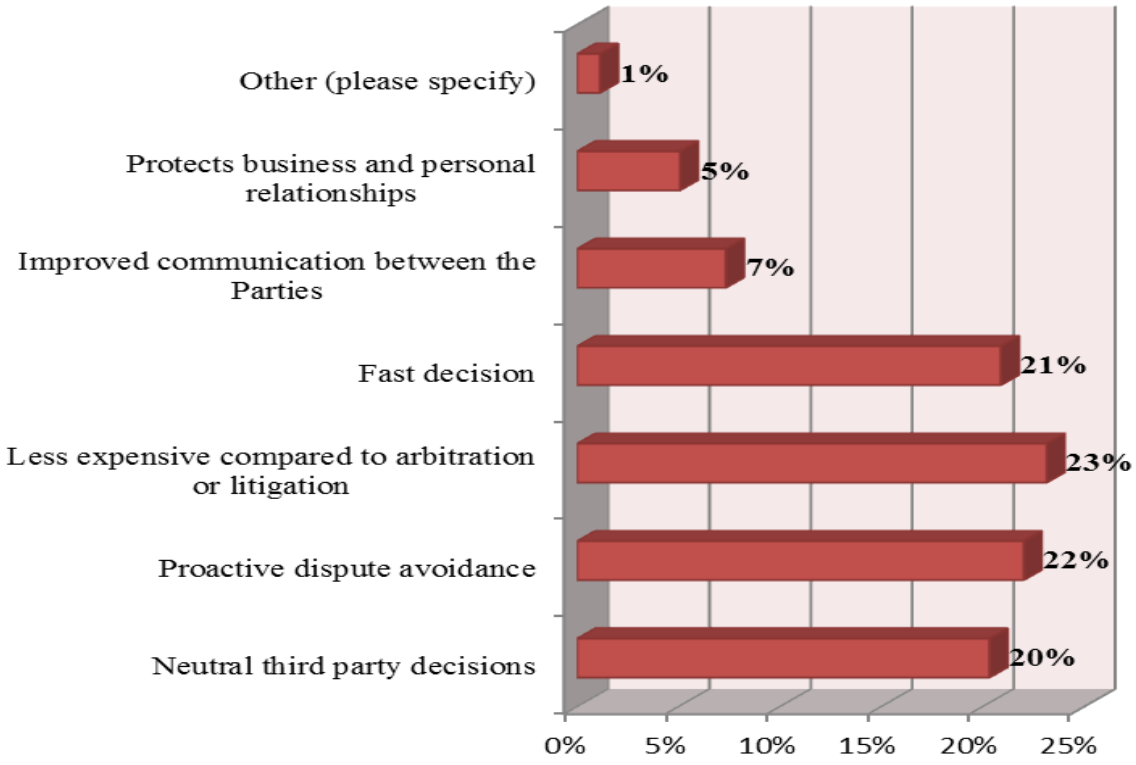
[309] "(Dispute boards) represent a paradigm shift away from the traditional focus of binding dispute resolution, in favour of dispute avoidance and management, which encourages issues to be resolved at project level without traditional adversarial attitudes". P Gerber and B Ong, 'DAPs: When will Australia Jump on Board?' (2011) 27 BCL 4

[310] DAB training methods will need to outline the philosophies and principles of DABs, so as to provide the necessary training to enable dispute avoidance as well as dispute resolution techniques.

[311] http://www.disputeboardsmena.com/ accessed 12 September 2017

[312] "On both the Daily Fee and the Retainer Fee, it is to be remembered when deciding on fees that the Contract Parties are investing in the DAB as a means of trying to avoid the much more costly and time-consuming process of international arbitration or litigation, it is important not to be Penny wise but pound foolish". N G. Bunni, 'Dispute Boards in the Middle East' (2013) DRBF Conference, Paris cited "The Dispute Board Manuel of the Japan International Corporation Agency" (2007)

Q11. In your opinion what would be the main advantage of DABs if utilised in the UAE?



DABs work more efficiently when there is respect from both parties to the processes and they are prepared to respect the decisions made by the DAB after a dispute has been referred. "Primarily, the presence of DAB will likely reduce confrontation and minimise disputes thus promoting a non-adversarial environment where timely execution of the work becomes possible".[313] Just over 23% of the survey participants felt the main advantage of DABs was they were less expensive compared to arbitration[314]. Another advantage identified by participants was that DABs promoted proactive dispute avoidance[315], the key to this is effective communication between the parties [316]. Just under 21% selected 'fast decision', resolving disputes in a timely manner will allow both parties have a better understanding of

[313] P Taplin and G Atherton, 'Will Hindsight Promote the Case for Dispute Adjudication Boards?' (2014) Adjudication Society Newsletter

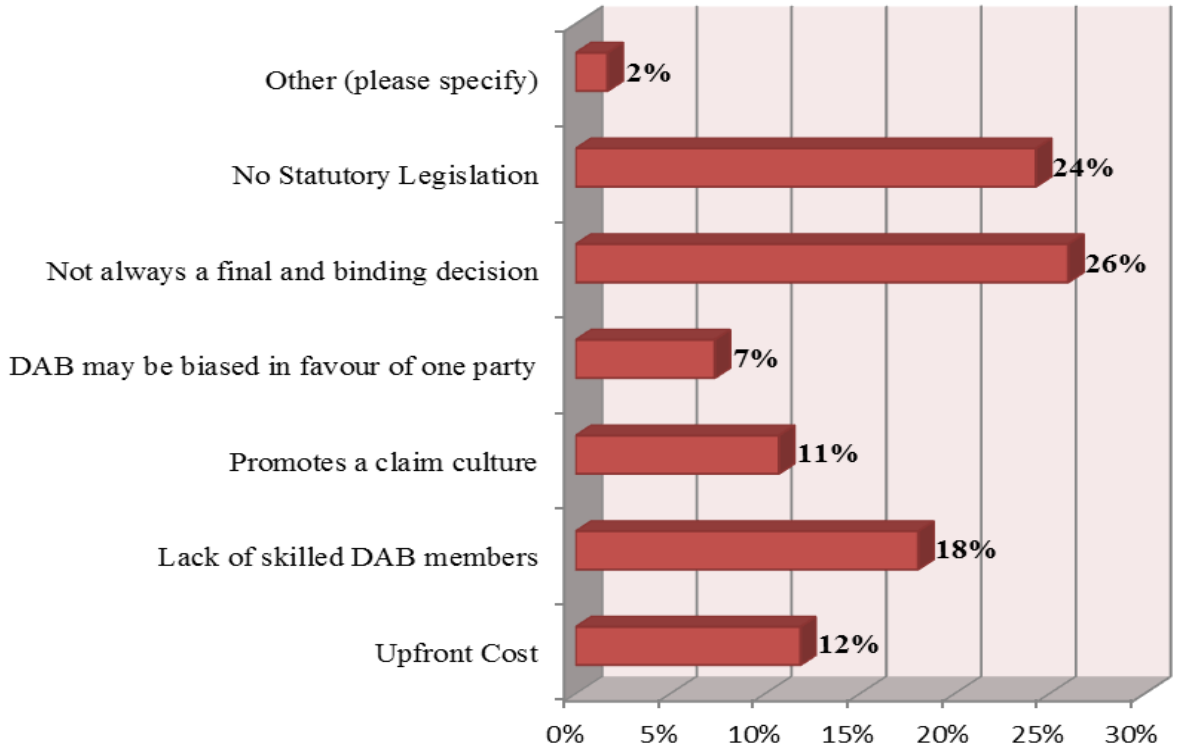
[314] Although the cost benefits of DABs are difficult to determine they are considerably less expensive and time consuming compared to arbitration and litigation.

[315] Boards can be tailored for specific projects, the DAB will have real time project knowledge through continual involvement as the project evolves resulting in fewer end of project claims as there is a focus on proactive dispute avoidance and management. Also, the parties have control over the process and disputes can be addressed immediately to experts with hands on construction experience.

[316] Better communication on the project between the parties, with resolution of issues at project level, which allow the project/contract to progress while the dispute is being resolved, thus reducing confrontation and antagonistic correspondence between the parties.

the final cost of the project, the impact on cash flow and programme. A further 20% held that the neutrality of DAB was one of the main advantages of the process[317].

Q12. In your opinion what would be the main disadvantage of DABs if utilised in the UAE?



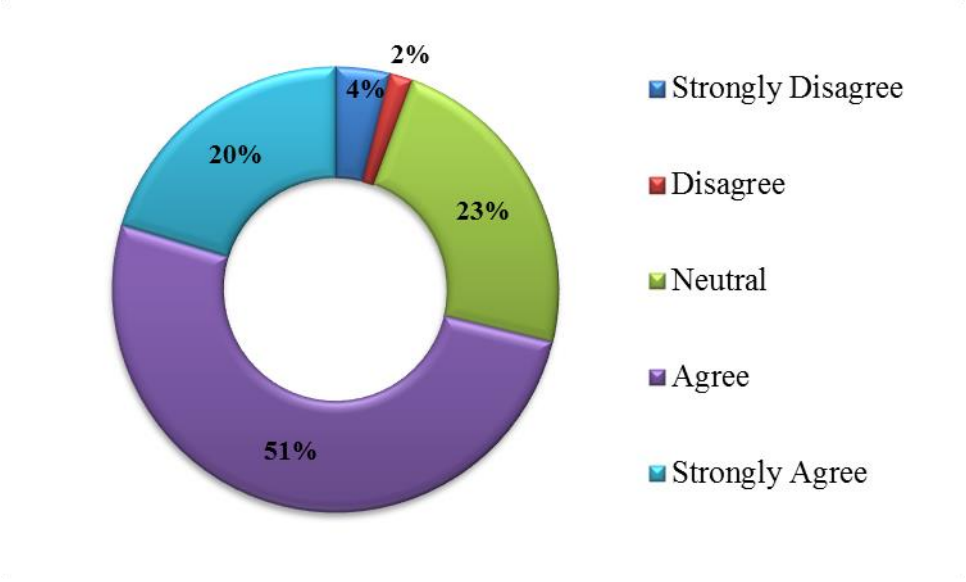
It can be difficult to change the mind-set of individuals or Employers who are used to dealing with disputes in a prescribed way, such as through arbitration or litigation. There may be a prejudiced attitude from the Employer that generally the Contractor's claims have no merit, and that disputes referred to DABs are just another layer of additional costs and lost time, thus leading to many Employer's reluctance to accept and embrace the benefits of DABs, especially in the UAE.

DABs are not perfect, there are some inherent disadvantages associated with the process[318], the parties must take the view if the advantages of the DAB outweigh the disadvantages for their particular project, there is no right or wrong answer to this, it depends on the

[317] Members are neutral as they are jointly appointed based on the agreement of both parties, and are make themselves available for casual consultations, thus reducing the need for third party intervention.
[318] The board carries out their investigation and issue a decision they are bound to follow the rules of natural justice. The board can be rendered ineffective if there are constant personality clashes between the board and the parties.

circumstances of the project in question and the parties attitudes to a number of various factors, such as risk, costs, programme, claims and dispute resolution to name but a few. The majority of survey participants (26%) held that the main disadvantage of DABs was that it was not always a 'final and binding decision'[319], a further 24% believed the lack of statutory adjudication in the UAE was a major drawback, such issues shall be discussed in more detail in Chapter 5.

Q13. Do you believe a form of Statutory Adjudication should be introduced in the UAE?

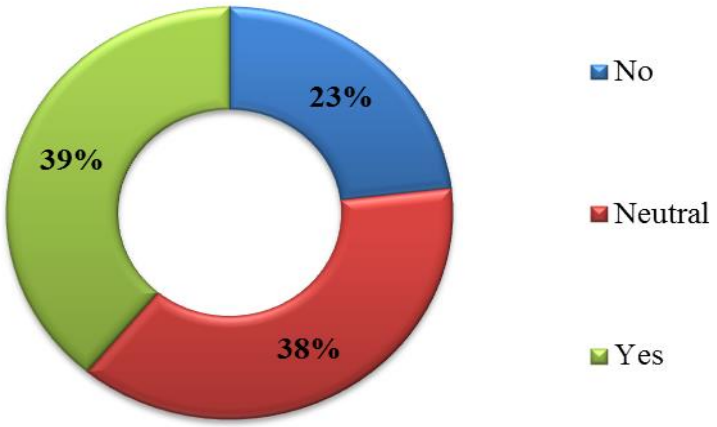


Not surprisingly 71% of the survey participants were in favour of Statutory Adjudication being introduced in some form under UAE legislation. But would UAE legislation mirror Adjudication legislation from common law jurisdictions, such as the UK. It could be argued that the UK, Canadian or Australian construction markets are more developed (mature) from a technical as well as a judicial perspective when compared to the UAE construction market. Although the majority of UAE construction professionals would welcome Statutory Adjudication, and the obvious benefits flowing from such legislation, as was expressed by one of the survey participants[320], the likelihood in the short to medium terms is that the UAE will not adopted such legislation.

[319] The biggest disadvantage of DABs is that the board's decision is only enforceable under the contract, it is not an arbitral award or judgement of the court. Where one party abuses and refuses to comply with the DBs decision, there will be additional cost and time incurred by the other party to enforce the board's decision.

[320] "When statutory adjudication is compared with other methods of dispute resolution in the UAE such as, local courts, arbitration, diwan and conciliation statutory adjudication definitely offers more advantages than most of

Q14. Would you support a form of 'Interim Award' based on the principle of 'Pay now, argue later' before the dispute is finally resolved by an arbitral tribunal or by the UAE Courts?



When compared with the results of Question 13 (which identified 71% of participants were in favour of Statutory Legislation) only 39% of UAE construction professionals supported the principle of 'pay now, argue later', which is one of the fundamental advantages of Statutory Adjudication. Perhaps this shows there is a lack of awareness as to what the principle of 'pay now, argue later' actually means (would this also imply that the principles of Statutory Adjudication are not really understood either), and follows on from Question 9 where only 19% of participants had a working knowledge of DABs. This would indicate there is still a lack of awareness in the UAE construction industry as to what Statutory Adjudication actually represents and the function of DABs as a form of dispute resolution. There is also a clear divide between how Contractors[321] and Employers/Engineers[322] view Statutory Adjudication and DABs.

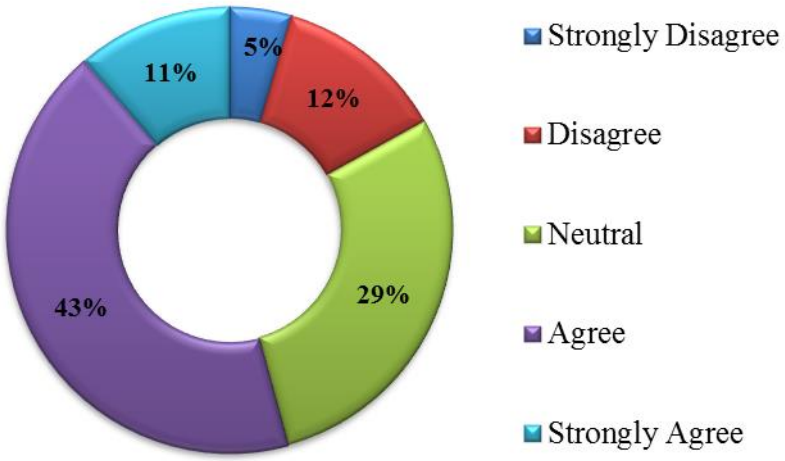
---

these other methods". "For example, there are many issues with court appointed experts in the UAE in that many of them are not experts in the field in which they have been appointed by the courts. If a system similar to that of the UK was established in the UAE then this kind of problem would not arise and parties would generally get 'the right answer".

[321] "If Employer's had to pay now and argue later it would assist Contractor's cash flow and potentially allow Contractor's to complete works on time or even ahead of schedule, as it stands, Contractors are required to chase money that is due and owing from Employer's, which can take several years after a project has been finished".

[322] "I love this idea, as a client, if you have selected your contractor properly, why not to go for this solution, but of course when you get such poor quality contractors you will be afraid to even pay the monthly payment certification".

Q15. In your opinion should DABs be the primary dispute resolution mechanism under UAE Construction Contracts?



Over 54% of participants agreed or strongly agreed that DABs should be the primary method of dispute resolution in the UAE. However, 29% of participants are yet not convinced and 17% disagree. This follows the trend of the survey which indicates that DABs are not yet fully understood in the UAE by the Employer or Contractor representatives. According to the survey data a high percentage of Engineers (both working for Employer and Contractor) are not in favour of the process, while DABs seem to be more popular with respondents from a QS/commercial background.

4.3. Conclusion:

In conclusion the survey provided some interesting and conclusive data, in that UAE construction professionals identified variation and EOT claims as the most common cause of dispute, in addition to unfair allocations of contractual risk (primarily transferred from the Employer to Contractor) and non-payment for works done, which is impacting cashflow. The majority of respondents identified speed of decision and cost as the most important criteria when it comes to resolving disputes, this would fit the criteria of what DABs could offer.

However, there seems to be a limited understanding of the DAB process in the UAE, with only 21% of respondents understanding how DABs function in practice. The reasons for this were identified as lack of awareness, education, training and the prevailing attitudes within the UAE construction industry itself to ADR methods and DABs. The main disadvantages of

DABs in the UAE were, the lack of statutory legislation, and the fact the decision is not a final and binding, for this reason it's not surprising that the majority of participants were in favour of some form of statutory adjudication being introduced in the UAE. In essence the cause and effect of disputes under UAE construction contracts could be addressed by a dispute avoidance/resolution method such as DABs. However, only a slight majority (54%) of respondents were in favour of DABs being the primary method of dispute resolution for the UAE construction industry.

Chapter 5

Analysis, Interpretation and Discussion

5.1. Introduction:

This chapter will discuss and analyse the findings of the semi-structured interviews undertaken with UAE construction professionals, the discussion will be supplemented with the conclusions drawn from the literature review and on-line survey. The focus of this chapter will be on addressing the final two objectives of the dissertation, which are to ascertain why DABs are not widely utilised in the UAE, and discuss actions which can be taken in the UAE to make DABs a viable alternative for the contracting parties.

5.2. DABs in the UAE Discussion and Analysis:

The Current UAE Construction Industry:

The UAE construction industry is likely to accelerate its output in the next two to three years, mainly due to the number of projects planned, and current projects which will have to be accelerated to meet the 2020 Expo. This may very well expose Employer's and Contractor's to high levels of commercial and contractual risk, coupled with the current market cash flow and liquidity issues, it seems the market conditions are ripe for a spike in construction related disputes requiring third party intervention. At the moment such disputes are settled amicably, or by referring to arbitration and/or UAE courts, ADR methods are currently not prevalent under UAE construction contracts. The findings from the interviews, on-line survey and current literature suggest that the lack of cash flow and liquidity in the market and below cost tendering are currently a major concern. Interviewee C and D stated:

"*At the moment Employers are tending to want to hold on to their money, when perhaps they don't have any entitlement to do so. Therefore, the Contractors are starved of cash which is impacting the viability of their companies".*[323]

"*Below cost tendering is also an issue, in the past UAE Government agencies only selected tier 1 Contractors to carry out large developments, in recent times this policy has changed and it seems to be the lowest price wins the Tender. It is not unusual for new Contractors to*

[323] Interviewee C – Code reference 2 and 3

submit Tenders 30 to 50% lower than the tier 1 Contractors, this will not be sustainable in the long term. Contractors will not survive in this environment".[324]

The lack of cash in the industry may have a detrimental impact on the supply chain in the short term which may give rise to an upsurge in construction commercial and contractual disputes, as was acknowledged by a number of the interviewees[325].

Claims and Disputes:

The major cause of disputes on almost all construction contracts are claims relating to variations, delay or disruption not being recognised and the unfair allocation of risk, this was also reflected in the respondents answers to the on-line questionnaire. A number of reasons were identified by the interviewees as to why claims become disputes, from the Contractor's side often claims are poorly expressed and do not always demonstrate contractual entitlement under the conditions of contract[326]. The Engineer under FIDIC 1999 is a representative of the Employer, however their role is still to make an impartial determination of claims under the contract[327]. Engineers in the UAE are not being impartial in their assessment of claims[328], telling quotations from Interviewee B and E are detailed as follows:

[324] Interviewee D – Code reference: 4 and 5

[325] "Having worked on several projects where the contractor is not getting paid, the contractor can finance the project for a short period of time only, if sub-contractors and material suppliers are not paid then there is a knock on effect in that labours and staff cannot be paid, and the project could come to a halt". Interviewee B – Code reference: 8

"In the past what has driven the UAE economy is the construction industry, with cash flowing down to other related industries and the rest of the economy. So once the cash is stopped at source it impacts not only the construction industry but the wider economy". Interviewee D – Code reference: 1 and 3

[326] "Reluctance of Contractors to take a 'contractual' position, e.g. acceptance of verbal instructions, failure to report delays to the Employer, failure to issues appropriate contractual notices, failure to keep and retain evidence of delay and disruption events". Interviewee E – Code reference: 16

[327] FIDIC 1999 Red Book [*Engineer's Determination*] "The Engineer shall consult with each party in an endeavour to reach agreement". "If agreement is not achieved, the Engineer shall make a fair determination in accordance with the Contract, taking due regard for all the relevant circumstances".

"The Engineer doesn't always consult with both parties, generally they just discuss the claim with the Employer before making a determination". Interviewee A – Code reference: 49

[328] "The Engineer not wanting to make a decision, usually for fear of upsetting the Employer, or making a decision which upsets the Contractor, inability, usually due to inadequate training in contracts and law, on the part of an Engineer to make a credible, reasoned decision". "Unfortunately, many mature and experienced Engineer's fail to give clear determinations and they have a lack of knowledge as to how the FIDIC conditions work". Interviewee A – Code reference: 7 and 42

"If the Engineer is not going to make a fair assessment it will only aggravate the situation, and put the Employer in breach of contract, that is not going to promote the resolution of the dispute. Sometimes the argument presented by the Engineer is that the Contractor has not presented all the information to them, where as in reality on most projects the Engineer has huge amounts of information available to him, there is a tendency for Engineer's to want all the information laid out on a plate for them. In some cases the Engineer's don't engage constructively with the Contractor, or don't communicate their responsibilities to the Employer properly. It

"*Engineer's in the UAE are falling short of internationally recognised codes of conduct, accepting appointments whereby their payments are, effectively, conditional upon doing the Employer's bidding, in addition to the lack of technical and language skills*".[329]

"*Also, the Engineers inadequately expressed responses to claims are another cause of dispute, where the Contractor submits a good claim in accordance with the conditions of contract, often six months after the Contractors submission the Engineer replies with a one line "your claim is rejected" without adequate reasons as to why the claim is rejected*".[330]

UAE Employers are unrealistic in the timeframe they want projects to be delivered in, their procurement route selection and conditions of contract transfer all the risk to the Contractor, and add in the rejection of legitimate variation and EOT claims by the Employer, and the result will be a powder keg of potential disputes[331]. Contractors are trying to mitigate potential LDs through various contractual claim mechanisms under the contract. However, a number of interviewees have raised concerns:

"*Currently, there is a blatant refusal to give extension of time or money for any claim, the Employer's don't seem to consider the impact of their own actions. Even when the Engineer or external consultant advises that the Contractor is entitled to time and costs the UAE Employer will argue otherwise*".[332]

The above research suggests there is a high potential for dispute within UAE construction contracts, to date UAE construction parties have not focused on dispute avoidance and management techniques, and only seem to react once the dispute has crystallised into arbitration or litigation proceeding[333]. The question to be addressed is why DABs are not

---

should be remembered that the Engineer provides a quasi-judicial role under the contract, where they are asked to make fair determinations as a matter of contractual agreement between the parties, if they don't make fair and reasonable determinations they are putting the Employer in breach of contract". Interviewee C – Code reference: 59 to 62

[329] Interviewee E – Code reference: 12

[330] Interviewee B – Code reference: 12

[331] "Employer's not ensuring that designs are adequately completed or coordinated, including the use of low-quality consultants, and failure to allocate enough money to the design process". "Employer's issuing design changes without issuing formal variations by the 'back-door' via amendments to shop drawings". Interviewee E – Code reference: 7 and 8

[332] Interviewee D – Code reference: 9 and 10

[333] "Absolutely, parties are only acting when and if disputes actually arise, it seems to be the culture that parties don't anticipate any disputes when the project commences, this never happen in reality". Interviewee B – Code reference: 21

widely utilised in the UAE construction industry, with an emphasis on dispute avoidance rather than dispute resolution via arbitration or litigation, parties embarking on commencing arbitration proceedings should be aware of its many pitfalls[334].

Why are the DAB related Sub-Clause removed from UAE Construction Contracts (FIDIC 1999)?

The on-line questionnaire found lack of awareness, education and training in addition to construction industry culture as the main reason what DABs are not utilised in the UAE, but there are also tactical reasons[335]. DABs have been proven to be successful in the "prevention of claims and disputes by promoting early and rational identification of issues, promoting constructive communication and making available a prompt nonbinding remedy which promotes bilateral negotiations".[336] So why has the UAE construction industry not embraced a proven method of dispute avoidance/resolution, Interviewee C enforced the points:

"*Lack of interest in resolving the dispute early, there is a strongly held view among Engineer's and Employer's that they get a better deal at the end of the project by deferring entitlement, when they get a wrap up deal in the final account. Its only when the final account deal cannot be agreed based on the terms being discussed do the parties then turn to some form of dispute resolution*".[337]

This substantial lack of awareness amongst UAE Employers and Contractors as to the benefits of dispute avoidance, and early dispute resolution, results in projects not being delivered on time and within budget, as was highlighted by interviewee B:

[334] "I don't think particularly Employer's and Contractors are giving enough regards with how they are dealing with their issues, that's reinforced by the fact that the number of disputes referred to arbitration without the parties really understanding what that means. Then the parties scramble round realising they started a process they don't really understand, and struggle accordingly. The cost and constraint timetable, the requirement to provide information to the tribunal all brings about the realisation that they started a process could have been avoided if the parties had employed dispute avoidance techniques". Interviewee C – Code reference: 10 to 12

[335] "I think it's a tactical decision, because Employer's feel they are in a better position to negotiate a solution if there is no third party in the background, to whom a dissatisfied Contractor can have recourse". Interviewee F – Code reference: 36

[336] R J Smith, *American Arbitration Association Handbook on Construction Arbitration and ADR* (3rd edn, Juris, New York 2016)

[337] Interviewee C – Code reference: 20 and 21

"*There is a genuine lack of knowledge and awareness of the advantages DAB's in the UAE, this is my experience from doing CPD presentations. However, 100% of the CPD participants believe the presence of DAB's will reduce the number of disputes*".[338]

Many Engineers and Consultants in the UAE have never experienced DABs before and are unfamiliar with the process, this can only be addressed through education and related sharing of experiences from DAB experts operating in other jurisdictions globally. However, UAE Employers are insisting on arbitration as the primary method of dispute resolution, this lack of awareness as to the benefits of DABs means there is a reluctance to embrace change, as was acknowledged by interviewee D and E:

"*In the UAE most construction related activity is controlled by the state, so arbitration will remain the default dispute resolution mechanism of choice*".[339]

"*It is important to recognise that there is a reluctance on the part of Employers to embrace any change to the commonly-used methods of dispute resolution because the arbitration process including, the length of time an arbitration takes, and the difficulty of enforcement is generally favourable to the Employer. Speedy resolution of disputes, and the payment of interim awards, is very unlikely to find favour amongst developers in the UAE*".[340]

The unwillingness to embrace change on the part of UAE Employers is based on the assumption that any form of ADR may weaken their commercial position, and the cost of a standing DAB is not justified. A common question asked by Employer's is why do we need to waste money when there is no dispute, especially when profit margins are low, and the cost of the dispute board will further dilute profits. This position is reinforced to Employers from various vested interests within the industry, lawyers, claim consultants and some Engineers who promote the belief that DABs are an unnecessary project cost, while overlooking the virtues of early dispute resolution procedures. As was identified in the literature review and analysis on the on-line questionnaire the cost of a standing DAB as a mechanism of dispute

[338] Interviewee B – Code reference: 23 and 24
[339] Interviewee D – Code reference: 48
[340] Interviewee E – Code reference: 25 and 26

avoidance/resolution is significantly less than proceeding to an arbitral tribunal or through the UAE courts[341]. Interviewee D enforced this point:

"*Employer's need to realise that it is actually cheaper to try and resolve disputes as they go, Employer's need to appreciate that it is more cost effective for an independent third party/parties to give a decision on a dispute rather than an arbitral tribunal or court*".[342]

There may be a number of other reasons why UAE Employers are reluctant to adopt the FIDIC 1999 conditions of contract and DAB related Sub-Clauses. One reason may be familiarity with their own standard conditions of contract, which may be modified to suit the Employer's needs. Moving to a new modified form of contract would incur a time and cost expense, in addition to the experience and knowledge lost. Also, there was a recent case in the UAE where the DAB rules were not followed, which reflected badly on the DAB process[343]. However, there is also an accountability issue, as was highlighted by an interviewee[344].

[341] "Generally the DAB will review the dispute in 46 to 60 days and issue the decision time is money, so DABs in this regard are more cost effective. DAB costs are shared by both parties, and there is an incentive not to rack up costs, DAB costs are 0.025% of the overall actual project costs". Interviewee A – Code reference: 24

[342] Interviewee D – Code reference: 42

"The California Transport Authority for the past 20 years have used DRB's on all their projects, which give non-binding recommendations. All the Contractors engage, and the Transport Authority always acknowledge the non-binding decisions, which means the Final Account is known six months before the project is completed, there are no arbitration or litigation costs, liability reduced and cash flows improved, resources can be reallocated to new project without the need to fight disputes on old projects. This is really forward thinking, and the Employer gets the benefits". Interviewee D – Code reference: 43 to 45

[343] A project in Dubai commenced in 2007 under FIDIC 1999 Red Book, a number of disputes were referred to the DAB. The DAB decisions took between 100 and 300 days with many delays in the procedures. The Employers was unhappy with the DABs decisions and attempted to have the decisions set aside in the Dubai Courts, on the grounds that the DAB had not rendered its decision with 84 days. The Employer also sued the DAB members for fees already paid, court and legal fees. The DAB continued to render decisions under the Contract as the case in the Dubai Courts proceeded. The Contractor received no payment in respect to the DABs decisions and also sued the DAB in the Dubai Courts, on the grounds the DAB proceeded ex-parte. S Hibbert, 'The Influence of Dispute Boards Around the World: The Middle East Experience' (2011) Introduction to International Adjudication Conference

[344] "There is also an accountability issue, in the sense that many large Employers seem to want a more rigours formal dispute resolution method available to them when resolving a dispute, rather than an individual make a recommendation that a certain number should be agreed". Interviewee F – Code reference: 21

Actions needed for DABs to become more widely accepted in the UAE

There are a number of measures that need to be addressed before DABs can become the mainstream dispute resolution procedure of the UAE construction industry. There needs to be a culture change within the industry itself, as was highlighted by interviewee E and F:

"Any change in the industry culture has to come from the highest possible level, as it did in the UK in the 1990s with the findings of the Latham report and the HGCRA, which was driven by legislation, which put into practice some of the recommendation made in the report"[345]

"*Government Employer's / Entities must take the lead in embracing DABs and other forms of ADR. This would help others to recognise the benefits of utilising DABs. Similarly, the UAE Courts would need to be encouraged to take a very robust approach to enforcement of temporarily binding decisions of DABs*".[346]

This cultural change may be driven by economic pressure or the introduction of legislation, or a combination of both. As was discussed previously in the study the Abu Dhabi Government Contracts (2007) provide for an ad-hoc DAB as a way to promote ADR, this was seen as a progressive step at the time[347]. However, the number of ad-hoc DABs appointed under the Abu Dhabi government contracts has been limited[348]. Seeing as the UAE Government (and individual Emirate Governments) are highly influential in the UAE construction industry, and have been the largest funders of major infrastructure projects in the country, they should be leading the way in encouraging a more balanced and rational distribution of risk under their contracts, while promoting dispute avoidance/resolution methods such as DABs.

---

[345] Interviewee F – Code reference: 38

[346] Interviewee E – Code reference: 58 to 60

[347] "The Abu Dhabi government construction contracts expressly wanted to keep the DAB provisions in the contracts, they didn't want them as standing DABs because they wanted the contract to be versatile to be used across a wide variety of contracts. Standing DABs work for large infrastructure projects, but for small works they are not cost effective, and are excessive. Here the Abu Dhabi government was showing leadership and enlightenment saying we want to promote ADR through DABs, and this is why these provision were made in the Abu Dhabi Government contracts". Interviewee C – Code reference: 41 to 43

[348] "This was a big step forward by Abu Dhabi, but there have been very few DAB's appointed despite it is a requirement. Perhaps Contractors are afraid to upset the Employer and request the formation of a DAB, even though it is a provision in the Employer's Contract (Abu Dhabi Government Contract)". Interviewee B – Code reference: 81 and 82

Some interviewees felt there was a lack of incentive to drive change within the industry itself, the opinion was that the industry is to fragmented and lacking cohesion, unlike other regions[349]. For this reason there needs to be a more proactive approach taken by the UAE Government (and State Bodies involved in the UAE construction industry) together with the key stakeholders in the construction industry, fostering contractual change and the acceptance of ADR methods. The introduction of Statutory Adjudication legislation or a 'pay now, argue later' principle in the UAE is unlikely in the short to medium term, as interviewee D expressed:

"*When UAE Employer's realise this will lead to prompt payments to Contractor's until the dispute is finally resolved, this could be a blocker to the introduction of statutory adjudication. Also, adjudication might not fit civil law countries as well as it does common law countries, adjudication is a common law thing that came along to maintain cash flow and get decisions made more quickly*".[350]

International professional bodies operating in the UAE, such as the RICS, CIOB or CIArb do provide education seminars as to the benefits of ADR and DABs within the UAE, but perhaps there needs to be a single coherent voice which can influence government decisions. It should be noted that ADR methods are becoming more common with ethically minded UAE Contractors and their supply chain when it comes to resolving disputes, with mediation the ADR method of choice[351]. Without the combined efforts of all parties in the industry and support of the UAE government and the judiciary the status quo will be maintained, meaning arbitration will be the only option available to resolve construction contractual disputes in the UAE, and methods such as DABs will continue to be overlooked by UAE Employers, to what they might perceive as their advantage[352].

[349] "In the UK contractor yield more power compared to contractors in the UAE, the Hong Kong Contractors association lobbied the government to incorporate a tiered dispute resolution mechanism under the contract, which included mediation and adjudication, which demonstrated the power of the industry bodies coming together". Interviewee C – Code reference: 70

[350] Interviewee D – Code reference: 60 and 61

[351] "ADR methods will become more common between the Contractors and the supply chain, because they need to resolve their disputes to survive economically". Interviewee D – Code reference: 18

[352] Employers are taking advantage of the fact that arbitration effectively allows them to keep their money in their own pocket. There is no appetite, I suspect, for accepting any measures which will be perceived by Employers as quick resolution of disputes, if that means earlier payments to Contractors. Of course, this is extremely short-sighted, in my view". Interviewee E – Code reference: 62 to 64

UAE Law, and DABs

There may be concerns from some quarters that the DAB award may not be enforceable in the UAE courts under current legislation, going by international standards and data the number of DAB awards that are referred to arbitration are approximately 2%. Therefore, 98% of disputes are resolved by the DAB to the satisfaction of both parties, however we never read about the successful DAB awards, it's only the minority of awards that are referred to arbitration or directly to the courts that receive academic commentary, this point was stressed by interviewee B:

"*If you look at DRBF statistics from the US 98% of disputes referred to the DRB are resolved, of the remaining 2% which go to Arbitration or Litigation, 98% of the decisions are similar to the DRB recommendations*".[353]

"If a DAB decision is to be immediately enforced by a court then it is a consideration of the substantive and procedural laws of the applicable country or countries that will determine whether there is any chance of success".[354] The UAE civil code enshrines the principles of good faith[355], which is fundamental to the success of the DAB, as was seen in the Swiss case[356]. Together with the principles of 'freedom of contract' the parties under a UAE construction contract are free to choose their contractual terms[357], if the parties have agreed under the contract to abide by the DABs decisions, then the court should give effect to this, failure to abide by the DAB decision would result in breach of contract by the defaulting party, this point has to be tested in the UAE courts[358]. The enforcement of the DAB decision

[353] Interviewee B – Code reference: 26
[354] N Gould, 'Enforcing a Dispute Board's decision: Issues and Considerations' (2013)
[355] "The duty of good faith is not designed to curtail or fetter the ability of the contracting parties to negotiate at arm's length, the law is not concerned with the perceived fairness of a properly negotiated deal and recognises the sanctity of the contract (subject, always, of course, to issues of public policy), the law will, however, interfere where circumstances suggest that conduct has been improper or designed to mislead". S Hunt, 'Good Faith' (2009) *DIFC* Law Update 2009, 221, 20
[356] 4A_124/2014 "Where by the Employer could not argue on the mandatory nature of the DAB procedure it had done so much to frustrate in the first place".
[357] *Pacta sunt servanda* 'Agreements must be kept'
[358] "More than likely, the UAE Court would unlikely say because there is a DAB decision it is final and binding, if both parties are still arguing about the issue in the eyes of the Court there is still a dispute, the UAE judges are not familiar with the commercial/contractual concepts adopted from other parts of the world". Interviewee D – Code reference: 54

(provisional award) should be treated similar to any other provision under the contract[359], interviewees C and E made the comments that:

"*If the parties have agreed to resolve their disputes in a particular way by DABs, the courts should effect to that and enforce the outcome of the contractually agreed process. The only circumstance in which the UAE courts should engage with are due process issues, the courts interest should be policing the contractually agreed process and not be replacing the decision maker or makers with themselves*".[360]

"*Provided that the contract clearly provides for the parties' agreement that a provisional award should have a temporarily binding effect, I do not see a good reason as to why the Courts should not enforce the provisional award. The key is to set out very clearly that the parties accept the provisional nature of the award, and must comply with the award on an interim basis until finally determined in arbitration or by Court proceedings*".[361]

As identified already the lack of cash flow in the UAE construction industry is leading to disputes, under current UAE legislation there is no provision for a summary judgement[362] based on the principle of 'pay now, argue later', this results in UAE Contractors being starved of cash years after projects and a lengthy dispute resolution process has been completed. Would UAE Employers support the idea of making payments against an interim award to Contractors on the recommendation of the DAB? Anybody familiar with the current UAE construction industry would say this scenario is highly unlikely, interviewee C stressed that:

[359] "However, the courts would not just rubber stamp the DAB award and turn it into a judgement, because the civil justice system is a key function of the state the courts would open up the DAB decision and look into it afresh, they may treat it like an Engineer's certificate as an indication of what the right answer might be". Interviewee F – Code reference: 56

[360] Interviewee C – Code reference: 85 and 86

[361] Interview E – Code reference: 81 and 82

[362] "In the UK the courts will grant a summary judgement where the parties have referred their dispute to a DAB, and the decision has being made the UK Courts will enforce it. The UAE Courts do not have any process of summary judgement, the DIFC Courts do have process which are a bit more summary in nature. There is a growing wealth of jusprudiance in the UAE, which say decisions should be approved summarily pending a final decision". Interviewee C –Code reference: 96 and 97

"*If the UAE government was to recognise that it's not good for industry or commerce for Contractors or Subcontractors to be put into insolvency due to lack of cash flow, then they might be more incentivised to get more involved*".[363]

There are many hypothetical legal arguments that could be applied to the enforcement/non-enforcement of a DAB awards in the UAE courts. However, as already highlighted if both parties approach the DAB in good faith and follow the decisions made by the DAB, be they 'final and binding', or 'binding, but not final' awards, then the number of DAB decisions referred to arbitration or the UAE courts should be in-line with the international standard, this view was not accepted by one interviewee[364]. There are a number options when it comes enforcing a DAB award in the UAE courts, the payment could be collected as a debt or part of an attachment order[365]. From the research undertaken it's clear there is an appetite for the use of DABs in the UAE, but also the realisation that the process will not replace arbitration in the short to medium term.

[363] Interviewee C – Code reference: 105

[364] "I think it is quite unlikely, given how few arbitration decisions are accepted in the UAE, remembering arbitral awards come at the end of a very through process in which both parties participate fully". "The arbitration award is not a million miles away from the DAB award, in that you have three independent exerts making a decision, but yet only 1 in 10 arbitral wards gets paid in the UAE". Interviewee F – Code reference: 58 and 59

[365] "In theory you could go to the UAE Court and say the DAB decision is a debt that must be paid, because the Arbitration sub-clause is for the referral of disputes. It may be the case in the UAE that the judge will instruct the other party to pay, the Courts have the power to do that in the UAE. This has been applied in other civil law jurisdictions (Eastern Europe) successfully. There are other options such as an attachment order against the bank account of the other party, the mechanisms are there, but there is too much uncertainty as to what the Court ruling would be, it depends on how experienced the judge is and their understanding of construction contract and the adjudication processes and procedures". Interviewee D – Code reference: 50 to 53

"An attachment order is the procedure whereby a litigant is able to attach the UAE assets of a counter-party in circumstances where it is suspected the counter-party may dissipate its assets, and can be obtained through the UAE Courts and, by obtaining such an attachment, a Claimant is able to obtain security to ensure that the counter-party retains sufficient assets for a judgment to be enforced". R Bell and A Thornton, 'Dispute resolution in Abu Dhabi – Part 2 – Litigation in the Courts https://www.clydeco.com/insight/article/dispute-resolution-in-abu-dhabi-part-2-litigation-in-the-courts accessed 29 November 2017

Chapter 6

Conclusion

6.1. Introduction:

The overall aim of this dissertation was to gauge UAE construction professionals perspective with regards the use and function of contractual DABs as a method of dispute avoidance/resolution, and identify if the wider use of DABs would be embraced within the UAE construction industry. To achieve the objectives of this study a comprehensive literature review identified the cause of construction disputes, detailed methods of dispute resolution available in the UAE, demonstrated the function, process and procedures of DABs and provided an analysis of DABs under FIDIC 1999 conditions of contract. Analysis and theories identified under the literature review were enhanced with an online questionnaire survey and semi-structured interview with industry experts.

This dissertation highlighted both the positive and negative features of the DAB process and provided commentary and discussion as to why DABs are not more widely used under UAE construction contracts. The study provided opinion and balanced assessment of what actions are now needed in order for DABs to become more mainstream, and an accepted method of dispute resolution within the UAE construction industry. The research has been successful in achieving the primary aims of this dissertation, and has been structured in a manner that allows the reader understand the link between risk, claims, disputes and different methods of dispute resolution. The results of the research presents a snapshot of the current UAE construction industry, and identified the difficulties and opportunities now facing it. The following conclusion shall summarise the observations of the research.

6.2. Conclusion:

Since the inception of DBs in the US during the 1960's their rise and popularity as a method of dispute resolution on international construction projects has been growing steadily, especially in common law jurisdictions, where the process has been supported by statutory legislation. The UAE construction industry is relatively young, and would be classified as an emerging market despite the number of high profile mega construction projects completed over the past 20 years. Bearing this in mind, the legal system is also relatively inexperienced when it comes to dealing with complex technical construction disputes, compared to more developed legal systems such as the UK, US and Western Europe. Acceptance of ADR methods such as DABs which could be employed to avoid and resolve construction disputes is still in its infancy in the GCC region, as opposed to the more formal dispute resolution

methods favoured by UAE Employers, such as arbitration and litigation. As highlighted in Chapters four and five, DABs are not viewed by UAE Employer's as a viable alternative to arbitration and litigation, and this stance seems unlikely to change in the near future.

The study research findings highlight that the majority of construction disputes are referred to arbitration in the UAE, arbitration has been the default dispute resolution mechanism of choice for UAE Employers/Contractors over the past 20 years. However, confidence in the process is not what is once due to the excessive costs and time taken to complete the arbitration process and enforce the award. Therefore, the region needs a new strategy to quickly resolve construction related dispute, and standing DABs seem to meet the criteria of a fast, cost effective dispute resolution process, coupled with the board members experience and knowledge of the construction industry, the benefits of the process are obvious. As the online questionnaire identified UAE construction professionals are open to other ADR methods. There is a realisation within the industry that the old methods of dispute resolution (arbitration and litigation) are no longer economically viable for many parties. There should be no reason why DABs could not experience the same growth arbitration experienced in the region since the mid-1990s, provided the UAE construction industry is committed to accepting such change, in a similar vein as to how the UK construction industry accepted the changes brought about by the introduction of the HGCRA.

As was identified in Chapter four FIDIC forms of contract are the most commonly used in the region. From experience FIDIC 1999 has become more popular with UAE Employer's and Contractor's over the past number of years, unfortunately the DAB related sub-clauses are generally deleted, the reasons for this were discussed in detail under Chapter five. The view of industry experts is that, UAE Employers are not prepared to settle dispute as the project progress, but rather wait until the TOC or even the DLC have been issued, and resolve all commercial and contractual matters within a final account settlement. The current cash flow and liquidity issues in the market are compounding the already difficult financial position many Contractors are now facing, with low profit margins, non-recognition of valid claims by UAE Employers and contracts which could be considered perilous. Major UAE Developers/Employers such as Emaar have reported profits of 27% for Q3 2017[366] while

[366] Emaar Properties (Q3-2017) Results https://www.emaar.com/en/Images/2017-11 12%20Emaar%20Properties%20Q3_2017%20IR%20Presentation_tcm223-117057.pdf accessed 28 November 2017

Damac have reported profits of 13%[367], while on the other hand Arabtec[368] and Drake & Scull[369] have reported losses. Are the auditors of these UAE Developers/Employers taking into account the reasons why Employers are showing profit and Contractors are not getting paid?

Following much analysis and reflection it is the expressed view that the advantages of DABs far outweigh any disadvantages associated with the process. Negative sentiments towards DABs are generally based on lack of knowledge and understanding of the DAB process and procedures. The most common perception parties have is that the DAB will have its own concept of fairness and equality, or that the DAB would promote a culture of claims and conflict. These myths can be easily debunked based on the statistical data available and the substantial scholarly commentary from international industry experts as to the advantages of contractual DABs, which have already been highlighted in this study. There are noted issues with the drafting of FIDIC 1999 Clause 20 (which will hopefully be addressed in the new FIDIC edition, to be released December, 2017)[370], but these limited negatives are far outweighed by the positives DABs contribute to dispute avoidance/resolution.

The UAE should be aiming to be a leader within the wider ME region in developing ADR methods, such as DABs and development of specialised court similar to the UKs TCC. As already discussed there needs to be a cultural change within the industry itself, supported by government legislation, and clear judgements from the UAE courts. Statutory Adjudication will not become a reality in the UAE in the short to medium term, but contractual adjudication in the form of DABs can, provided the parties follow the DAB procedures and respect the decision of the DAB. There is recognition within the industry that change is needed, but for this change to materialise UAE Employers will have to be convinced of the merits of DABs, which culturally, commercially and contractually may indeed prove difficult

[367] W Abbas, 'Damac see uptick in Q3 revenue' *Khaleej Time* (UAE 18 October 2017)
[368] I John, 'Arabtec swings to Dh 2.35b annual loss' *Khaleej Times* (UAE 22 February 2016)
[369] D Saadi, 'Drake & Scull removes CEO, narrow second quarter loss' *The National* (UAE 14 August 2017)
[370] The original Clause 20 is now split into two separate entities, Clause 20 is now entitled [*Employer's and Contractor's Claims*] and Clause 21 [*Disputes and Arbitration*]. "Clause 20 prescribes a Claims procedure that applies to both Employer and Contractor Claims". "Sub-Clause 20.2, which is the longest Clause within the General Conditions, imposes greater administrative requirements on a Party when issuing a Claim". "Dispute Adjudication/Avoidance Boards ("DAABs"): New Clause 21 requires the Parties jointly to appoint a 'standing DAAB'; that is, a DAAB that is appointed at the start of the Contract, and remains in place for the duration of the Contract to assist the Parties in the avoidance of disputes, and in the 'real-time' resolution of Disputes, if and when they arise". E Baker, A P. Lavers and R Major, 'A New FIDIC Rainbow: Red, Yellow and Silver' (2017) https://www.whitecase.com/publications/alert/new-fidic-rainbow-red-yellow-and-silver accessed 06 December 2017

in the short term[371]. It is unlikely that UAE Employer's will relinquish their perceived position of bargaining strength when it comes to resolving contractual disputes, by allowing a third party render binding/temporarily enforceable decisions during the course of the project. The UAE construction industry is unlikely to see contractual DABs becoming mainstream in the short to medium term, even though UAE construction professionals can clearly see the benefits of DABs.

6.3. Achievement of Dissertation Objectives:

The following table outlines in summary the dissertation objectives and findings.

Dissertation Objectives	Research Findings
• To discuss construction risks and the causes of construction disputes in the UAE.	• Under Chapter two the link between contractual risk, claims and disputes were identified. This was supplemented with commentary from UAE industry experts and data obtained from the on-line questionnaire.
• To examine and explain the functions of DABs.	• The history, function, process and procedures of DABs were identified and complemented with contemporary literature.
• To investigate the DAB Sub-Clauses under FIDIC 1999 Red Book with particular focus on recent international court rulings with regards the enforcement of the DABs decision, and how this would apply in the UAE Courts.	• A detailed analysis of FIDIC 1999 Clause 20 [*Claims, Disputes and Arbitration*] with a comprehensive assessment of recent international court rulings directly related to Clause 20 was provided. The author also commented on how DAB awards may be treated under UAE law, and how the UAE Courts would interpret a DAB decision.

[371] There is a fear that DABs may take away the commercial control UAE Employers currently hold over the Contractor, but there also has to be a realisation that the current status quo of dispute resolution is not sustainable in the long term.

• To identify if construction professionals in the UAE actually want DABs as a method of dispute avoidance/resolution.	• A progressive online survey was undertaken to identify if UAE construction professionals were aware of DABs and would they welcome the introduction of DABs as a mechanism to resolve construction contractual disputes. The results of the survey were detailed under Chapter four.
• To ascertain why DABs are not utilised more in the UAE, and the reasons why.	• Under Chapter five the author documented a number of reason why DABs are not more widely utilised in the UAE, the discussion and analysis was developed based on the data collected from conducting a number of semi-structured interviews with UAE construction professionals (lawyers, DAB members and industry experts). Analysis was enhanced with the data received from the on-line questionnaire and the contemporary literature review undertaken for this study.
• To discuss actions which can be taken in the UAE to make DABs a viable option for the contracting parties.	• A number of actions and suggestions were provided in order to establish if DABs could be considered a viable option to arbitration or litigation in the UAE. The discussion was based on contemporary literature, the online survey results and comments derived from the semi-structured interviews.

Figure 6.1. Dissertation Objectives and Findings

6.4. Further Study:

Research is a continuous process, it provides answers to specific questions, but while doing so it also raises many others. While it could be suggested that this dissertations findings represent a valuable academic contribution to research conducted in the UAE construction industry, it is also acknowledged that there remains significant potential and opportunities for the wider use of ADR methods, and particularly DABs in the UAE. Further research and investigation into the topic would contribute and help expand the knowledge of UAE construction professionals as to the benefits of DABs.

As identified in Chapter five there needs to be unified approach taken by all parties involved in the UAE construction industry, to educate and develop dispute avoidance methods first, and then develop cost/time effective methods of dispute resolution. The author would be interested in carrying out further research by direct consultation with the professional bodies, major contractors (international and domestic), developers/employers and the UAE legal profession, so as to identify the various options available to resolve construction disputes under UAE construction contracts, this could provide a consensus or road map as to how construction disputes can be resolved in future.

6.5. Research Limitations:

While the general literature relating to DABs in the UAE was limited due to the fact that the use of DABs are generally restricted to Abu Dhabi Government contracts, the sample size within the UAE is quite small. However, there are a number of papers and books relating to the subject from other GCC countries and wider civil law jurisdictions, in addition to case studies in the US, Europe, Far East and the African continent. Due to the limited number of current or past member that have served on a UAE DAB it was difficult to get a consensus as to how UAE DABs function in reality. A number of interview requests were sent to the largest UAE Employer's in order to get their perspective of claims, dispute and DABs. Unfortunately, there was no positive response to participate in the research. At the time of this dissertation submission there was not an opportunity to review the revised FIDIC 1999 conditions of contract (2017 edition) or evaluate any significant changes to Clause 20.

Word Count:

Word Count 21,964 excluding the Declaration, Abstract, Acknowledgements, Abbreviations, Contents Page, Footnotes, Figures, List of Interviewee, Bibliography, Appendices, and Word Count.

Bibliography:

Textbooks:

Adriaanse J, *Construction Contract Law* (2nd edn, Palgrave Macmillan, New York 2007)

Bachard F and Geinas F, *The UNCITRAL Model Law after Twenty Five Years: Global Perspective on International Commercial Arbitration* (1st edn, Juris, New York 2013)

Biggam J, *Succeeding with your Master's Dissertation* (1st edn, Open University Press, UK 2008)

Bogardus A, *PHR / SPHR Professional in Human Resources Certification Study Guide* (2nd edn, Wiley Publishing, Indiana 2007)

Brannen J, *Mixing Methods: Qualitative and Quantitative Research* (1st edn, Routledge, New York 2016)

Bunni N G, *The FIDIC Forms of Contract* (3rd edn, Blackwell Publishing, Oxford 2005)

Burr A, *Delay and Disruption in Construction Contracts* (5th edn, Informa Law from Routledge, Oxon, 2016)

Chern C, *Chern on Dispute Boards Practice and Procedures* (3rd edn, Routledge, New York 2015)

Chern C, *Chern on Dispute Boards: Practice and Procedure* (1st edn, Blackwell Publishing, Oxford 2008)

Chern C, *The Law of Construction Disputes* (2nd edn, Informa Law Routledge, New York 2016)

Cheung S, *Construction Dispute Research Conception, Avoidance and Resolution* (1st edn, Springer, Switzerland 2014)

Coulson P, *Coulson on Construction Adjudication* (2nd edn, Oxford University Press, Oxford 2011)

Creswell J W. and V L. Plaro Clark V L., *Designing and Conducting Mixed Method Research* (2nd edn, Sage Publications, London 2011)

Davis P S, *JC Smiths The Law of Contract* (1st edn, Oxford University Press, Oxford 2016)

Enhada C Y, Turnage Gatlin C and Wilshusen F, *Fundamentals of Construction Law* (1st edn, ABA Book Publishing, New York 2003)

Fenn P, *Commercial Conflict Management and Dispute Resolution* (1st edn, Spon Press, Oxon 2012)

Fullerton R, *American Arbitration Association Handbook on Construction Arbitration and ADR* (3rd edn, Juris, New York 2016)

Glover J, Thomas C and Hughes S, *Understanding the New FIDIC Red Book: A Clause by Clause Commentary* (1st edn, Sweet and Maxwell, UK 2006)

Godwin W, *International Construction Contracts a Handbook* (1st edn, Wiley-Blackwell, UK 2013)

Gould N, Capper P, Dixon G and Cohen M, *Dispute Resolution in the Construction Industry* (1st edn, Telford Publishing, London 1999)

Hanson S, *Legal Method and Reasoning* (2nd edn, Cavendish Publishing Limited, London 2003)

Harmon K, *American Arbitration Association Handbook on Construction Arbitration and ADR* (3rd edn, Juris, New York 2016)

Hewitt A, *Construction Claims and Responses: Effective Writing and Presentation* (2nd edn, Wiley Blackwell, UK 2016)

Hibberd P and Newman P, *ADR and Adjudication in Construction Disputes* (1st edn, Blackwell Science, Oxford 1999)

Knight A and Rudduck L, *Advanced Research Methods in the Built Environment* (1st edn, Blackwell Publishing, UK 2008)

Knowles J R, *200 Contractual Problems and their Solutions* (3rd edn, Wiley-Blackwell, UK 2012)

Mackie K, Miles D, March W and Allen T, *The ADR Practice Guide Commercial Dispute Resolution* (3rd edn, Tottel Publishing, UK 2007)

Mallat C, *Introduction to Middle Eastern Law* (1st edn, Oxford University Press, Oxford 2007)

Mistelis L A, *Concise International Arbitration* (1st edn, Kluwer Law International, Netherlands 2010)

Murdoch J and Hughes W, *Construction Contracts Law and Management* (4th edn, Taylor and Francis, London 2008)

Murdoch J, Chapman R and Hughes W, *Construction Contracts Law and Management* (5th edn, Routledge, London 2015)

Naoum S G., *Dissertation Research and Writing for Construction Students* (3rd edn, Routledge, New York 2013)

Oliver P, *Writing Your Thesis* (1st edn, Sage Publications, London 2004)

Picard L, *American Arbitration Association Handbook on Construction Arbitration and ADR* (3rd edn, Juris, New York 2016)

Redmond J, *Adjudication in Construction Contracts* (1st edn, Blackwell Science, Oxford 2001)

Rudestam K and Newton E R., *Surviving Your Dissertation* (2nd edn, Sage Publications, London 2001)

Smith R J and Rubin R A, *American Arbitration Association Handbook on Construction Arbitration and ADR* (3rd edn, Juris, New York 2016)

Stephenson D A., *Arbitration Practice in Construction Contracts* (5th edn, Blackwell Science, Oxford 2001)

Swetman D, *Writing your Dissertation* (3rd edn, How to Books, UK 2005)

Toison S, Glover J and Sinclar S, *Dictionary of Construction Terms* (1st edn, Informa Law Routledge, Oxon 2012)

Totterdill B W., *FIDIC Users' Guide a Practical Guide to the 1999 Red Book* (1st edn, Thomas Telford, London 2001)

Uff J, *Construction Law* (11 edn, Sweet and Maxwell, London, 2013)

Journal Articles:

Ahmed B, Randeniya C and Kiriella Bandara M, 'Litigation and enforcement in the United Arab Emirates: overview' (2017)

Al Tamimi E, 'Mediation – Does it work in the Middle East' (2014) Law Update 2014, 269, 10

Bassiony M S, El-Karim A, El Nawawy A and Abdel-Alim A M, 'Identification and assessment of risk factors affecting construction projects' (2014) HBRC Journal Volume 13, Issue 2, 2017

Bowes D, 'Practitioners Perception of Adjudication in UK Construction' (2007) Procs 23rd Annual ARCOM Conference

Bunni N G, 'A Comparative Analysis of the Claim & Dispute Resolution Provisions of FIDIC's 1999 Major Forms of Contract Against its Earlier Forms' (2006)

Bunni N G, 'Dispute Boards in the Middle East' (2013) DRBF Conference

Bunni N G, 'The Gap in Sub-Clause 20.7 of The 1999 FIDIC Contracts for Major Works' (2005)

Bunni N G, Ong C and O'Reilly M, 'The Enforcement of Dispute Adjudication Board Decisions: Persero and the FIDIC Standard Form of Contract' (2015) 81 Arbitration, Issue 4 Chartered Institute of Arbitrators

Bunni N G, 'What has History Taught Us in ADR? Avoidance of Dispute!' (2015) 81 Arbitration, Issue 2, Chartered Institute of Arbitrators

Chapman P, 'The Use of Dispute Boards on Major Infrastructure Projects (2015) Turkish Commercial Law Review, Vol 1, No.3

Chern C and Koch C, 'Efficient Dispute Resolution in the Maritime Construction Industry Dispute Boards in Maritime Construction' (2005)

Clutterham C, 'Methods of Dispute Resolution Series: - Mediation' (2010) Law Update 2010, 223, 9

Dedezade T, 'Are 'binding' DAB decisions enforceable? (2011) Construction Law International, Volume 6, Issue 3

Di Folco G and Tiggeman M, 'Enforcement of a DAB Decision Through an ICC Final Partial Award' (2010) The Dispute Board Federation, Issue 59

Gerber P and Ong B, ‘DAPs: When will Australia Jump on Board?’ (2011) 27 BCL 4

Gerber P and Ong B J, ‘Look Before you Leap: Avoiding the Traps and Maximising the Benefits of Your DRB’ (2012)

Gillion F, ‘Enforcement of DAB Decisions Under The 1999 FIDIC Conditions of Contract’ (2011) The International Construction Law Review

Gould N, ‘Conflict Avoidance and Dispute Resolution’ (2012) RICS Professional Guidance UK GN 91/2012

Gould N, ‘Enforcing a Dispute Board’s decision: Issues and Considerations’ (2013)

Gould N, ‘Establishing Dispute Boards – Selecting, nominating and Appointing Board Members’ (2006) Society of Construction Law International Conference in Singapore

Gould N, ‘Recent Developments: domestic and international’ (2004) 10th Adjudication Update Seminar

Gould N and Lockwood C, ‘Dispute Board Rules Chartered Institute of Arbitrators’ (2014) Practice and Standards Committee

Griffiths D, ‘Do Dispute Review Boards Trump Dispute Adjudication Boards in Creating More Successful Construction Projects?’ (2010) Chartered Institute of Arbitrators, 76 Arbitration 4

Harbst P and Mahnken V, ‘ICC Dispute Board Rules: the Civil Law Perspective’ (2006) 72 Arbitration 4

Hibbert S,‘The Influence of Dispute Boards Around the World: The Middle East Experience’ (2011) Introduction to International Adjudication Conference

Hutchinson T C, ‘Developing Legal Research Skills: Expanding the Paradigm’ (2008) Melbourne University Law Review, 32

Hunt S, ‘Good Faith’ (2009) *DIFC* Law Update 2009, 221, 20

John S M, ‘Dispute Review Boards in the Context of UK Construction’ (2002)

Kerr M, Ryburn D, McLaren B and Or Dentons Z, ‘Construction and Projects in the United Arab Emirates: Overview’ (2014) Practice Law, Multi-Jurisdictional Guide 2013/14

Kerur S and Marshall W, 'Identifying and Managing Risk in International Construction Projects' (2012) International Review of Law 2012, 1, 08

Khekale C and Futane N, 'Management of Claims and Dispute in Construction Industry' (2013) International Journal of Science and Research

O'Reilly M, 'Legislation, Rules and Guidelines – The Chartered Institute of Arbitrators Dispute Board Rules' (2015) 81 Arbitration Issue 2, Chartered Institute of Arbitrators

Owen G, 'The Working of the Dispute Board (DAB) Under New FIDIC 1999 Red Book', (2003)

Powell A, 'Mediation in the UAE' (2012) Law Update 2012, 248, 1

Powell A, 'The Centre for Amicable Resolution of Disputes in Dubai' (2013) Law Update 2013, 256, 13

Ragnar R and Mahnken V, 'ICC Dispute Board Rules: the Civil Law Perspective' (2006) 72 Arbitration 4

Reymond C, 'The Channel Tunnel case and the law of International Arbitration' (1993) Law Quarterly Review 109, 337-342

Rubert M L, 'Enforcement of Local Arbitration Awards in the UAE' (2014)

Seppala C, 'How not to Interpret the FIDIC Disputes Clause: The Singapore Court of Appeal Judgment in Persero' (2012) The International Construction Law Review, Volume 29, Part 1

Seppala C, 'The new FIDIC provisions for a Dispute Adjudication Board' (1997) The International Construction Law Review, Volume 14, Part 4

Sunna E and Al Saadoon O, 'FIDIC in the Middle-East' (2007)

Sunna E, 'FIDIC 1999 Red Book - A Practical Overview' (2007) Law Update 2007, 192, 26

Taplin P and Atherton G, 'Will Hindsight Promote the Case for Dispute Adjudication Boards?' (2014) Adjudication Society Newsletter

Tweeddale A, 'FIDIC's Guidance Memorandum to users – a half-baked solution?' (2014) Construction Law International, Volume 9 Issue 2

Zahidul Islam M, 'Legal Enforceability of ADR Agreement' (2013) International Journal of Business and Management Invention 2319 – 8028

Online Articles:

Albertini A and R Chaplin R**, '**The Role Of Dispute Adjudication Boards Under FIDIC: A View From The Courts' (2014) http://www.mondaq.com/x/356714/Contract+Law/The+Role+Of+Dispute+Adjudication+Boards+Under+FIDIC+A+View+From+The+Courts accessed 25 August 2017

AMEC Capital Projects Limited v *Whitefriars City Estates Limited* [2004] EWHC 393 (TCC) https://www.fenwickelliott.com/research-insight/adjudication-case-notes/amec-capital-projects-limited-v-whitefriars-city-estates-limited accessed 20 November 2017

Bailey C, Roughton D, Gilmore D, Margetson G, Godwin P and Willock K, 'The competence-competence doctrine and the enforcement of arbitral awards' (2011) https://www.lexology.com/library/detail.aspx?g=70303764-71b7-4352-babb-6c8c8d399190 accessed 23 September 2017

Baker E, Lavers A P. and Major R, 'A New FIDIC Rainbow: Red, Yellow and Silver' (2017) https://www.whitecase.com/publications/alert/new-fidic-rainbow-red-yellow-and-silver accessed 06 December 2017

Bakirci N, 'The Role of Mediation in the DIFC Courts' (2015) http://globallawsummit.com/the-role-of-mediation-in-the-difc-courts/ accessed 24 October 2017

Balfour Beatty Construction Limited **v** *The Mayor & Burgesses of the London Borough of Lambeth* [2002] EWHC 597 (TCC) https://www.fenwickelliott.com/research-insight/adjudication-case-notes/balfour-beatty-construction-limited-v-mayor-burgesses-london-borough-lambeth accessed 21 October 2017

Bell A, Witt J and Hall N, 'Dispute Adjudication Boards' (2014) http://www.arabianindustry.com/construction/news/2014/dec/4/dispute-adjudication-boards-4894760/ accessed 31 July 2017

Bell R, 'United Arab Emirates: Dispute Resolution In Abu Dhabi Part 1 - Litigation Is Not The Only Way' (2011) http://www.mondaq.com/x/151798/Arbitration+Dispute+Resolution/Dispute+Resolution+In+Abu+Dhabi+Part+1+Litigation+Is+Not+The+Only+Way accessed 29 November 2017

Business Laws of the United Arab Emirates (2011) https://www.akingump.com/images/content/4/4/v4/4452/UAE-Business-Law-Book.pdf accessed 11 September, 2017

Dispute Adjudication Boards, http://www.arabianindustry.com/construction/news/2014/dec/4/dispute-adjudication-boards-4894760/ accessed 05 September 2017

DRBF Practices and Procedures (2007) http://www.drb.org/concept/manual/ accessed 30 September 2017

Emaar Properties (Q3-2017) Results https://www.emaar.com/en/Images/2017-1112%20Emaar%20Properties%20Q3 2017%20IR%20Presentation_tcm223-117057.pdf accessed 28 November 2017

Fastrack Contractors Ltd v *Morrison Construction Ltd* [2000] BLR 168 http://www.adjudication.co.uk/archive/view/case/76/fastrack_contractors_ltd_v_morrison_construction_ltd_%5B2000%5D_blr_168 accessed 28 October 2017

FIDIC MDB Harmonised Construction Contract http://fidic.org/MDB_Harmonised_Construction_Contract accessed 21 August 2017

Glover J, 'FIDIC Dispute Adjudication Boards' https://www.fenwickelliott.com/research-insight/articles-papers/contract-issues/fidic-dispute-adjudication-boards accessed 19 September 2017

Glover J, 'Sub-Clause 20.1 – the FIDIC Time Bar under Common and Civil Law' (2015) https://www.fenwickelliott.com/research-insight/articles-papers/contract-issues/sub-clause-fidic-time-bar accessed 31 October 2017

Global Construction Disputes Report (2017) Avoiding the same Pitfalls Arcadis https://images.arcadis.com/media/2/4/B/%7B24BB2290-3108-4A38-B441-E3C0B95FB298%7DGlobal_Construction_Disputes-2017.pdf accessed 15 October 2017

Goodrich M, 'Dispute Adjudication Boards: Are they the future of dispute resolution?' (2016) https://www.whitecase.com/publications/article/dispute-adjudication-boards-are-they-future-dispute-resolution accessed 01 September, 2017

Habib S, 'A new arbitration law for the United Arab Emirates third time lucky?' (2017) https://www.lexology.com/library/detail.aspx?g=17b326b4-9f83-4ca3-aa23-b4ca2e0f93f1 accessed 14 November 2017

Halki Shipping Corporation v *Sopex Oils Ltd* [1997] Adj.L.R. http://www.nadr.co.uk/articles/published/ZzzzarbitrationLawReports/Halki%20v%20Sopex%201997.pdf accessed 22 October 2017

Hibbert S, 'Dispute Resolution in Abu Dhabi (Part 3) – A Lot Now Rides on Success of the DAB System' (2010) http://kluwerarbitrationblog.com/2010/04/22/dispute-resolution-in-abu-dhabi-part-3-a-lot-now-rides-on-success-of-the-dab-system/ accessed 30 September 2017

International Construction Market Survey (2017) http://www.turnerandtownsend.com/media/2389/icms-survey-2017.pdf accessed 15 October 2017

Jordan S, 'Adjudication is future of dispute resolution' (2015) http://www.cmguide.org/archives/4108 accessed 28 September 2017

Jordan S, 'Getting on board with dispute boards' (2014) http://www.gulfconstructiononline.com/news/160263_Getting-on-board-with-dispute-boards.html accessed 01 June 2017

Khokhar N and Brown D, 'The New 2015 ICC Dispute Board Rules' (2016) https://www.clydeco.com/insight/article/the-new-2015-icc-dispute-board-rules accessed 05 November 2017

Monetary Fund World Economic Outlook (2017) https://www.imf.org/en/Publications/WEO/Issues/2017/09/19/world-economic-outlook-october-2017 accessed 28 October 2017

Nambair S, 'Slow Transition for FIDIC 99 Contract Form in the UAE' http://www.emirates247.com/eb247/companies-markets/construction/slow-transition-to-fidic-99-contract-forms-in-the-uae-2010-01-28-1.5756 accessed 28 August 2017

O'Leary D, 'Using Dispute Adjudication Boards to Resolve Construction Disputes' http://www.tamimi.com/en/magazine/law-update/section-14/february-8/using-dispute-adjudication-boards-to-resolve-construction-disputes.html accessed 30 September 2017

Oxford Islamic Studies Online http://www.oxfordislamicstudies.com/article/opr/t125/e1936 accessed 31 October 2017

Rizvi Z, 'FIDIC in the Middle East - The Must Know for Industry Players' https://www.lexology.com/library/detail.aspx?g=beeb6477-d429-4864-add4-57ea6f5c0197 accessed 28 September 2017

SD-101 - DPI - Dispute Potential Index: A Study into the Predictability of Contract Disputes https://www.construction-institute.org/resources/knowledgebase/knowledge-areas/disputes-prevention-resolution-(best-practice)/topics/rt-023/pubs/sd-101 accessed 30 September 2017

Sellers L, 'FIDIC's dispute adjudication boards: a guide to their use in the UAE' (2015) http://www.elexica.com/en/legal-topics/construction/21-fidics-dispute-adjudication-boards-a-guide-to-their-use-in-the-uae accessed 21 September 2017

Shafaat A, 'The Meaning of Ijma' (1984) http://www.islamicperspectives.com/meaningofijma.htm accessed 31 October 2017

The Dispute Resolution Board Foundation DB Project Database https://www.drb.org/publications-data/drb-database/ accessed 30 September, 2017

The International Monetary Fund Statistical Appendix (October 2017) https://www.imf.org/en/Publications/WEO/Issues/2017/09/19/world-economic-outlook-october-2017 accessed 14 October 2017

What to expect from your FIDIC dispute adjudication board members https://www.out-law.com/en/topics/dispute-resolution-and-litigation/arbitration-and-international-arbitration/what-to-expect-from-your-fidic-dispute-adjudication-board-members/ accessed 02 October 2007

Newspapers:

Abbas W, 'Damac see uptick in Q3 revenue' *Khaleej Time* (UAE 18 October 2017)

John I, 'Arabtec swings to Dh 2.35b annual loss' *Khaleej Times* (UAE 22 February 2016)

Saadi D, 'Drake & Scull removes CEO, narrow second quarter loss' *The National* (UAE 14 August 2017)

Government Publications:

Access to Justice, Final Report (HMSO London, 1996)

Alternative Dispute Resolution: Mediation and Conciliation (Law Reform Commission Ireland, 2010)

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

The Placing and Management of Contracts for Building Works,(MSO, London, 1964)

Table of Statutes and Cases

Statutes (Acts of Parliament):

Access to Justice Act (1999)

Australian Capital Territory Building and Construction Industry (Security of Payments) Act (2009)

English Arbitration Act (1996)

English Civil Procedure Rules (1999)

Housing Grants, Construction and Regeneration Act (1996)

Malaysia The Construction Industry Payment and Adjudication Act (2012)

New South Wales (Australia) Building and Construction Industry Security of Payment Act (1999)

New Zealand The Construction Contract Act (2002)

Singapore Building and Construction Industry of Payment Act (2004)

The Local Democracy, Economic Development and Construction Act (2009)

The Scheme for Construction Contracts (England and Wales) Regulations 1998, SI 1998/649

U.A.E Civil Laws:

UAE Civil Transaction Code, Law # 5 of 1985

UAE Civil Procedure Code, Federal Law # 11 of 1992

UAE Federal Law # 26 of 1999

Table of Cases:

APPENDICIES:

Appendix A: Dissertation Proposal Form.

Appendix B: Semi-Structured Interviews (Coded).

Appendix C: Questionnaire Survey Results.