



THE ADMINISTRATION OF CONTRACTUAL DELAY AND DISPUTE RESOLUTION IN THE UAE

إدارة التأخر في التنفيذ وفض النزاعات في ظل القانون الاماراتي

BY

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This research paper submitted in fulfillment of the requirements for
the degree of MSC in Construction Law and Dispute Resolution.

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November 2015

Abstract

This thesis examines the approach of the parties towards administering the conditions of contract with regards to contractual delay and ascertain as to why construction projects in the UAE are notoriously late in project delivery and why so many projects find themselves in dispute.

Throughout the course of my studies the forms of contract available to the Employers and their consultants were studied and found to be quite extensive and the dispute mechanisms presented by them were found to be fair to both parties to the contract.

What research establishing was that the most common forms of contract were the FIDIC 1987 and FIDIC 1999 “Red Book” contracts. Considering the dispute mechanisms within these contracts, why is it that the parties find themselves so often engaged in formal dispute and particularly arbitration.

The research was conducted through an on-line survey of one hundred construction professionals for which there were seventy three respondents.

The questions ranged from but were not limited to:

1. The causes of delay most commonly experienced,
2. The party most commonly found to be the cause of the delay,
3. The most common form of contract utilized in the UAE,
4. How the conditions of contract were applied, and
5. What were the contractual outcomes in the form of dispute resolution applied?

The data provided supported my own experience whilst working on projects in the UAE for the last ten years that the choice of contract made was superficial, as the majority of contracts were bespoke and heavily weighted towards the Employer. Despite this what was evident was that no matter the form of contract, the Employer and his consultants constantly failed in the administration of the contracts leading to formal dispute.

The UAE is developing its structure towards having a modern system of dispute resolution that would encourage in particular the likes of Mediation and International Arbitration.

What is clearly displayed by the data received from this research is the Employers willingness to allow disputes to evolve and carry on for protracted periods of time with detriment to the project and the relationship of the parties.

Would the industry and the parties to the contract be better advised or encouraged to administer the conditions of contract and address the disputes at the time of its occurrence as with the use of a Dispute Adjudication Board, or Mediation rather than the costly exercise of Arbitration?

ملخص

تبحث هذه الأطروحة في نهج الأطراف نحو ادارة شروط العقد بخصوص التأخير التعاقدى والتأكد لماذا تأخرت مشاريع الانشاء في دولة الامارات بشكل ملحوظ في تسليم المشاريع ولماذا تجد العديد من المشاريع نفسها محل نزاع.

طوال فترة دراساتي، فان نماذج التعاقد المتوفرة لشركات التوظيف ومستشاريها كانت مدروسة وتبين أنها واسعة المجال ووجد بأن آلية النزاع المقدمة منها عادلة لكلا طرفي التعاقد.

ما كان ينص عليه البحث هو أن أكثر أشكال التعاقد الشائعة كانت عقود "الكتاب الأحمر" للاتحاد الدولي للمهندسين الاستشاريين (فيديك) 1987 والاتحاد الدولي للمهندسين الاستشاريين (فيديك) 1999 مع اعتبار آليات النزاع ضمن هذه العقود، لماذا يجد الأطراف أنفسهم مرارا ضالعين في نزاع رسمي و وبخاصة اللجوء الى التحكيم.

لقد تم البحث من خلال دراسة استطلاعية لمائة من محترفي الانشاء وقد تم الحصول منها على ثلاثة وسبعين مجيب.

لقد كانت الأسئلة تتراوح بين ولا تقتصر على:

1. السبب الأكثر شيوعا للتأخير ،
2. الطرف الذي كان المتسبب الأكبر في التأخير،
3. أكثر شكل من أشكال التعاقد في دولة الامارات،
4. كيف تم تطبيق شروط العقد، و
5. ماذا كانت النتائج التعاقدية في شكل حل النزاعات الذي تم تطبيقه.

لقد دعمت البيانات الموفرة تجربتي الخاصة بينما كنت أعمل في مشاريع في دولة الامارات في السنوات العشر الأخيرة بحيث تم خيار التعاقد سطحيا، حيث كانت أغلبية العقود تخاطب مقدما وموجهة بشكل أساسي نحو شركات التوظيف. وعلى الرغم من ذلك، تبين أنه مهما كان شكل التعاقد، فقد فشلت شركات التوظيف ومستشاروها في ادارة العقود مما أدى الى نزاع رسمي.

ان دولة الامارات تطور من بنيتها نحو منظومة حديثة من فض النزاعات والتي قد تشجع على وجه الأخص الوساطة والتحكيم الدولي.

ما تبين بوضوح من خلال البيانات الواردة من هذا البحث هو استعداد شركات التوظيف للسماح بأن تتطور وتستمر النزاعات لفترات متطاولة من الزمن بما يضر بالمشروع وعلاقات الأطراف.

هل من الممكن تقديم النصح الأفضل أو تشجيع الصناعة أو أطراف التعاقد على ادارة شروط العقد و توجيه

النزاعات وقت حدوثها الى مجلس تحكيم النزاعات، أو الوساطة بدلا من التكاليف الباهظة التي يتكبدها اللجوء

الى للتحكيم؟

Dedication

To Mum

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CHAPTER ONE: INTRODUCTION

Due to its uniqueness in diversity of design, logistics and culture, it may be argued that delay on projects in the construction industry is often unavoidable.

Taking this into account, a plethora of research^{1, 2, 3, 4} has been undertaken over recent years each attempting to establish exactly as to why project delay is so prevalent in the UAE when compared to other countries such as for example the UK.

Such prevalent project delay has ultimately lead to an increase over recent years in the industries employment of claims consultants, independent experts, contract administrators, arbitrators and lawyers alike, the costs of which are very rarely if not ever encapsulated in either the Employer's budget or the Contractor's price.

1.1 - Hypothesis

Having spent over thirty five years in the construction industry of which ten of them have been in the UAE as a Commercial Director for the largest contracting company in the UAE, I have experienced delay on almost every project undertaken.

This project sets my own experience in the limitation of contracts to be either one of the FIDIC Red Books or a "bi-product" of the same for which I have experienced that both the Employer and his Engineer in almost every case fails to administer the contract where Employers delay is the root cause in the contractor failing to complete his contracted works by the contract "Time for Completion".

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1. See Lucy Barnard article in "The National Business" November 30 2015
 2. See Omayma Motaleb and Mohammed Kishk paper "An Investigation into the Risk of Construction Project Delays in the UAE – www.igi-global.com/chapter/an-investigation-into-the-risk-of-construction-projects-delays-in-the-uae/115375
 3. See Z. Ren, M. Atout and J Jones "Root Causes pf Construction Project Delays In Dubai"
 4. See Davina Munro article "Louvre Abu Dhabi: Construction delay pushes opening to 2016 <http://meconstructionnews.com/story/5051/louvre-abu-dhabi-construction-delay-pushes-opening-to-2016>

Experience has shown me that due to various reasons (in particular incomplete design) the projects have resulted in dispute for which the usual outcome(s) are either late settlement with the Employer after the project has been completed, or arbitration.

The following aims and objectives are set to investigate if my experience of contract administration and dispute resolution are particular to myself or the UAE construction industry as a whole.

1.2 - AIMS AND OBJECTIVES

Aims

Noting the extent of project delay in the UAE, this research aims to investigate the provisions of the contracts most frequently used on projects in the UAE with particular focus on:

- a) how contractual delay is to be administered under a contract via the various dispute mechanisms and processes identified within the conditions of contract, and
- b) If these mechanisms and processes are administered what are the subsequent outcomes of the disputes encountered.

In analyzing the various results of this research, the writer shall also compare this research with that of his own experiences whilst working for a leading contractor in the UAE.

Objectives

- a) Collate data to analyze the reasons behind project delay in the UAE,
- b) Collate data relevant to the forms of Contract utilized in the UAE and their subsequent administration,
- c) Collate data to establish the most frequently used methods of dispute resolution encountered in the UAE and establish the most preferred method through the opinions of industry professionals.

1.3 - Research Methodology

In order to achieve the aims and objectives of this research, the methodologies applied in this research are both qualitative and quantitative.

The research undertaken makes particular reference to the FIDIC 1987 and 1999 forms of “Red Book” contracts in support of the hypothesis that these are found to be the most frequently used forms of contract in the UAE and that the common outcome of disputes encountered under these contracts are invariably settled in arbitration.

In undertaking this research a questionnaire containing thirty questions of predominantly multiple choice was issued to one hundred recipients engaged in:

1. Contracting,
2. Claims consultancies, and
3. Legal backgrounds

Eventually seventy three responses were received for which these responses were analyzed for the purpose of addressing the aims and objectives of this research.

1.3.1 - Research Structure

The following path has been applied In order to establish a basis for the outcomes of the research:

Chapter One – Introduction: provides the general background of this research, its main aims and objectives and a summary of the methods used.

Chapter Two - Literature Review of Contractual Delay in the UAE: reviews:

- a) The conditions of contract(s) most frequently applied in the UAE and the experiences encountered in the approach of the parties towards applying the extension of time mechanisms of the contract(s).
- b) Review the alternative forms of dispute resolution most commonly encountered in the UAE these being:
 - Mediation,
 - Conciliation,
 - Adjudication or DAB, and
 - Arbitration.

Chapter Three – Research and Analysis: This chapter shall discuss the findings of the research results conducted for the purpose of this paper and connects with the methodology previously proposed in collating the data.

Chapter Four – Conclusion: presents the conclusion(s) to the research undertaken with a comparison as to whether the original hypothesis was supported by the research undertaken and considers as to where improvement could be made in the administration of the contract.

CHAPTER TWO: LITERATURE REVIEW OF CONTRACTUAL DELAY IN THE UAE

The two main questions to be addressed through this research are:

1. how contractual delay is to be administered under a contract via the various dispute mechanisms and processes identified within the conditions of contract, and
2. If these mechanisms and processes are administered what are the subsequent outcomes of the disputes encountered.

This chapter identifies the most commonly used forms of contract(s) in the UAE and the contractual remedies for extension of time to the “contract Time for Completion”.

2.1- TYPICAL FORMS OF CONTRACT

The most common forms of contract(s) utilized in the UAE have been established through research and experience as being either:

- The 1987 FIDIC Red Book⁵,
- The 1999 FIDIC New Red Book⁶, or
- A bespoke version of one of these contracts that have been heavily amended within the particular conditions of contract.

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5. See Federation Internationale Des Ingenieurs-conseils Conditions of Contract for Works of Civil Engineering Construction Part 1 General Conditions Fourth Edition 1987 – Alternatively known as the “Red Bok”.
 6. See Federation Internationale Des Ingenieurs-conseils Conditions of Contract for Construction For Building And Engineering Works Deigned By The Employer, General Conditions, First Edition 1999 – Alternatively Known as the “New Red Book”.

2.2 – THE FIDIC 1987 RED BOOK

2.2.1 – FIDIC Red Book Contract 1987

Clauses 43, 44, 46, 47 and 48 of the 1987 / 92 of the FIDIC Red Book provide the conditions by which the contract manages the risk of extension of time.

Clause 43.1 - [Time for Completion States] states:

*“The whole of the Works and, if applicable, any Section required to be completed within a particular time as stated in the Appendix to Tender, shall be completed, in accordance with the provisions of Clause 48, within the time stated in the Appendix to Tender for the whole of the Works or the Section (as the case may be), calculated from the Commencement Date, **or such extended time as may be allowed under Clause 44**”* (bold and underline added).

Clause 43.1 confirms the basic obligation for the Contractor to complete his obligations either on or before the finalized extended time for completion. In providing such a provision for extending the contract time for completion the Employer is protected against any action brought under the prevention principle setting time at large.

Clause 44.1 - [Extension of Time for Completion] - provides the events that shall govern entitlement to extension of time and states:

“In the event of:

- (a) The amount or nature of extra or additional work,*
- (b) Any cause of delay referred to in these Conditions,*
- (c) Exceptionally adverse climatic conditions,*
- (d) Any delay, impediment or prevention by the Employer, or*
- (e) Other special circumstances which may occur, other than through a default or breach by the Contractor for which he is responsible,*

Being such as fairly to entitle the Contractor to an extension of the Time for Completion of the Works, or any Section or part thereof, the Engineer shall after due consultation with the Employer and the Contractor, determine the amount of such extension and shall notify the Contractor accordingly, with a copy to the Employer.”

It is important to note that although parts (a) (b) and (c) of this Sub-Clause are quite specific with regards to delay caused by variations, the conditions of contract or the weather, parts (d) and (e) would appear to present almost a catch all for events that may cause delay to the project for which the Employer is deemed responsible, however the inclusion of the word “fairly” actually diminishes this leaving the condition open to argument.

The inclusion of a condition that operates as a “catch all” is particularly relevant under UK common law where in the absence of a provision for a matter that has caused delay to the project the argument as to time being “at large” may be sought as in the case of *Peak Construction v McKinney Foundations* (1970) 1 BLR 114.⁷

The obligations towards the Engineer acting fairly are reflected under clause 2.6 [Engineer to Act Impartially]. It is interesting to note that this obligation has been removed under the FIDIC 1999 suite of contracts.

Where Clause 44.1 states:

“the Engineer shall after due consultation with the Employer and the Contractor, determine the amount of such extension”

It is evident through my research question 11 that the Engineer does not comply with the requirement regarding the administration of Sub-Clause 44.1. Unfortunately due to its drafting, the contract fails here to identify an actual time frame for the Engineer to consult and deliver his decision and therefore research supports that the Engineer’s and Employers tend to ignore the requirement of Clause 44.1.

Clause 44.2 - [Contractor to Provide Notification and Detailed Particulars] states:

In my experience this condition along with the results of the research illustrate where the parties to the contract commonly fail in the timing and serving of notice and the Engineer’s common reasoning for not issuing entitlement for extension of time.

7. See James Pickavance and Michael Mendelibat "The Peak Effect"

The common argument is whether or not the failure to serve notice forms a "Condition Precedent" under the contract and as such would this condition be fatal to the Contractor recovering his entitlement to extension of time in the UAE under Article 246 (1) of the UAE CPC.

Under common law a condition precedent must be complied with as a failure to serve notice in accordance with the conditions of contract shall be deemed fatal and as such the Contractor shall lose his entitlement to claim.

Under the UAE Civil Code there are several Articles that may counter the validity of a "condition precedent":

- Article 32 – *"A mandatory provision (of law) shall take precedence over a contractual stipulation."*
- Article 106 (c) – *"If the interests desired are disproportionate to the harm that will be suffered by others."*
- 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."*
- Article 246 – *"(1) The contract must be performed in accordance with its contents, and in a manner consistent with the requirements of good faith.

(2) The contract shall not be restricted to an obligation upon the contracting party to do that which is (expressly) contained in it, but shall also embrace that which is appurtenant to it by virtue of the law, custom, and the nature of the transaction."*
- Article 257 – *"The basic principle in contracts is the consent of the contracting parties and that which they have undertaken to do in the contract."*

- Article 258 – *“(1) The criterion in (the construction of) contracts is intentions and meanings and not words and form.”*
- Article 265 – *“(2) If there is scope for an interpretive construction of the contract, an enquiry shall be made into the mutual intentions of the parties beyond the literal meaning 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.”*
- Article 473 – *“A right shall not expire by the passage of time but no claim shall be heard if denied after the lapse of fifteen years without lawful excuse, but having regard to any special provisions relating thereto.”*

Sub-Clause 44.3 – [Interim Determination of Extension]

Sub-Clause 44.3 governs the effects of delay that continue beyond the stated 28 days. The cause of delay itself may not take this amount of time, however the effects and subsequent impact of the delay may go beyond the 28 day period due to dependent activities and as such this condition in reality is not practical and may be subject to re-planning issues that affect the interim particulars.

My experience in using this condition (and one supported by this research) is one of engaging with a very time consuming process where the Engineer fails to issue any interim determination for extension of time. The resultant effect is that numerous delay events are reported on with the Contractor “running out” of planned time and as such in the absence of the Engineer utilizing (or ignoring) the mechanics of the Contract, time could be seen as being “at large”⁸.

Clauses 44.3 is there for dependent on the Engineer and his Employer engaging with the Contractor’s claims for extension of time and where appropriate grant the Contractor his entitlement to extension of time that allows the Contractor to re-programme the Works.

Research has found that the common approach to Clause 44.4 on projects within the UAE is for the Engineer to be served with a letter from the Contractor requesting an Engineer’s decision under Clause 67.1 [Engineer’s Decision”. The obvious implication here is a

protracted decision (if any) being made as to extending the Time for Completion and potentially entering into dispute.

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8. Nael Bunni “The FIDIC Forms of Contract Third Edition” Chapter 17 –Delay in Completion and Claims for Extension of Time Page 343 and 344. See comments regarding “*Time at Large*”

Clause 46.1 [Rate of Progress]

Clause 46.1 provides the means by which the Engineer may instruct the Contractor to accelerate if the rate of progress of the Works has fallen behind that of the planned dates. The Contractor will be required to accelerate his progress to ensure that the project will be delivered in accordance with the programme and shall do so at his own cost including also the supervision of the Employers consultants.

This point can present a contractual dilemma in that does:

- a) the Contractor incur the cost of mitigating his delay, or
- b) is it simply cheaper for him to absorb the financial consequences of the delay from Liquidated Damages.

The key point regarding this condition is that the Engineer is only entitled to request the Contractor to mitigate delay in matters not covered by a claim for extension of time “*which does not entitle the Contractor to extension of time*”. With this in mind it is of utmost importance that the Engineer administers the contract under Clause 44 and in doing so can review exactly where the Contractor may be culpable for delay that period.

This research and my own experience in the UAE supports the fact that the Engineer does not meet with his obligations under Sub-Clause 46.1 in taking into account the situation where claims for extension of time have been applied for. The failure in the Engineer not complying with his obligations towards extending the Time for Completion results in preventing the Contractor from re-programming the Works.

As the project inevitably fails to complete by the contractual Time for Completion and in the absence of any extension of time, prolongation costs or disruption monies the only

contractual outcome for the Contractor (if he has not already done so) is to request the Engineer's decision in accordance with Sub-Clause 67.1.

Clause 47.1 [Liquidated Damages for Delay]

Contractual delay to projects ultimately results in the application of Clause 47.1 and the Employers right to apply Liquidated Damages for delay.

Under common law in the UK Liquidated Damages are usually ascertained as a reasonable amount by which the Employer would be actually damaged if the project were to be delayed. In the instances where delay is caused by the Contractor on projects in the UK and Liquidated Damages were sought, then the Contractor is legally obliged to pay the damages as stated in the Contract.

In the UAE either Liquidated Damages or a Penalty is often stated in the Appendix to Contract that would be applied where the Contractor is late in completing the project. A point of note here is that Penalties for delay are unlawful under UK common law.

Despite the contractual agreement regarding Liquidated Damages or alternatively Penalties under UAE construction contracts, the UAE Civil Code presents a different scenario to that of UK common law.

Under Article 390⁹ of the UAE Civil Code, the judge has the discretion to therefore increase or decrease the amount of compensation actually applied for under the contract in order to rectify actual cost incurred by the Employer and subsequently avoid unjust enrichment. On the other hand Contractor beware as to the fact that failure to complete on time and secure any extension of time to actual Time for Completion may render the Contractor to damages in excess of those stipulated under the contract being enforced under Article 390.

2.2.2 - The FIDIC First Edition 1999 New Red Book¹⁰

My experience and subsequent research has shown that in the UAE, the alternative form of FIDIC "Red Book" contract to that of the 1987 edition is that of the "*Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer First Edition 1999.*"

The introduction of the FIDIC 1999 New Red Book has worked itself into projects primarily undertaken in Abu Dhabi where the Abu Dhabi government has adapted its use along with the FIDIC 1999 Yellow Book as their main forms of contract.

9. Article 390 (2) of the UAE CPC states: *“The judge may in all cases, upon the application of either of the parties, vary such agreement so as to make the compensation equal to the loss, and any agreement to the contrary shall be void.”*
10. Federation Internationale Des Ingenieurs-conseils Conditions of Contract for Construction For Building And Engineering Works Deigned By The Employer, General Conditions, First Edition 1999 – Alternatively Known as the “New Red Book”.

Despite numerous notice requirements, the main clauses regarding extension of time are contained within Section 8 Commencement, Delays and Suspension.

Clause 8.4 [Extension of Time for Completion] states:

“The Contractor shall be entitled subject to Sub-Clause 20.1 [Contractor’s Claims] to an extension of the Time for Completion if and to the extent that completion for the purposes of Sub-Clause 10.1 [Taking Over of the Works and Sections] is or will be delayed by any of the following causes:

- (a) A Variation (unless an adjustment to the Time for Completion has been agreed under Sub-Clause 13.3 [Variation procedures] or other substantial change in the quantity of an item of work included in the Contract,*
- (b) A cause of delay giving an entitlement to extension of time under a Sub-Clause of these Conditions,*
- (c) Exceptional adverse climatic conditions,*
- (d) Unforeseeable shortages in the availability of personnel or Goods caused by epidemic or governmental actions, or*
- (e) Any delay, impediment or prevention caused by or attributable to the Employer, the Employer’s Personnel, or the Employer’s other contractors on the Site.*

If the Contractor considers himself to be entitled to an extension of the Time for Completion, the Contractor shall give notice to the Engineer in accordance with Sub-Clause 20.1 [Contractor’s Claims]. When determining each extension of time under Sub-Clause 20.1, the

Engineer shall review previous determinations and may increase, but shall not decrease, the total extension of time.”

Sub-Clause 8.4 of the FIDIC 1999 New Red Book is very similar to that of the FIDIC 1987 Red Book but for two significant change in them adding part (d) whilst at the same time removing part (c) of Sub-Clause 44.1 of the 1987 Red Book and as such FIDIC have removed what was considered to be the “catch all” clause.

“other special circumstances which may occur, other than through a default or breach by the Contractor for which he is responsible”

Noting the common law position regarding ‘time at large’ it is hard to see why FIDIC would wish to hamper the Employers grounds for extending the contract Time for Completion by removing Sub-Clause 44.1 (c)

Part (b) of Sub-Clause 44.1 makes reference to *“A cause of delay giving an entitlement to extension of time under a Sub-Clause of these Conditions”*.

The use of this condition takes onboard the numerous references made within the Conditions of Contract to Sub-Clauses providing the Contractor with entitlement to time (and indeed cost).

Such Sub-Clauses are:

- Sub-Clause 1.9 [Delayed Drawings or Instructions]

This Sub-Clause is similar to Sub-Clause 6.3 of the FIDIC 1987 Red Book in that it requires the Contractor to serve notice to the Engineer that if information is not released by a prescribed date, then then project will be in delay. Notice given under this Sub-Clause 1.9 provides that if the Engineer fails to prove the requested information then the Contractor shall issue further notice of delay. This is again similar to Sub- Clause 6.4 [Delay and Cost of Delay of Drawing] of the FIDIC 1987 contract which would entitle the Contractor to time and cost.

- Sub-Clause 2.1 [Right of Access to the Site]

This Sub-Clause is similar to Sub-Clause 42.1 and 42.2 of the FIDIC 1987 Red Book in that it presents the Contractor with entitlement where the Employer has failed to give the Contractor possession of the Site in accordance with agreed dates or

conditions. Again the Contractor is obliged to serve notice in accordance with Sub-Clause 20.1 in order to secure entitlement to time and cost plus reasonable profit.

- Sub-Clause 4.7 [Setting Out]

This Sub-Clause is similar to Sub-Clause 17.1 of the FIDIC 1987 contract in that it presents the Contractor with entitlement to time and cost where the Contractor incurred delay due to the Engineers erroneous setting out.

- Sub-Clause 4.12 [Unforeseeable Physical Conditions]

This Sub-Clause is similar to Sub-Clause 12.2 of the FIDIC 1987 Contract in presenting potential entitlement for extension of time and cost in instances where delay has been caused for which an experienced Contractor could not have reasonably foreseen the physical condition that has brought about delay to the project..

- Sub-Clause 4.24 [Fossils]

This Sub-Clause is similar to Sub-Clause 27.1 of the FIDIC 1987 contract and presents the Contractor with possible entitlement to time and cost in circumstances where the Works are delayed due to artifacts or remains being uncovered on the Site.

- Sub-Clause 7.4 [Testing]

This Sub-Clause is similar to Sub-Clause 36.4 and 36.5 of the FIDIC 1987 contract and provides the Contractor for potential recovery of time and cost by which delay or cost has been incurred due to acting upon an Engineer's instruction that caused delay or cost to the Works and for which the Contractor bore no responsibility.

- Sub-Clause 8.5 [Delays Caused by Local Authorities]

This Sub-Clause provides the Contractor with entitlement to time in accordance with Sub-Clause 8.4 [Extension of Time for Completion] but does not make reference to the recovery of cost incurred for delay caused by local authorities.

- Sub-Clause 8.9 [Consequences of Suspension]

This Sub-Clause is similar to Sub-Clause 40.1 and 40.2 of the FIDIC 1987 Red Book contract in providing the Contractor with entitlement to time and cost on occasion where the Engineer has through no fault of the Contractor suspended the Works.

- Sub-Clause 10.3 [Interference with Tests on Completion]

This Sub-Clause presents the Contractor with potential entitlement to time and cost where delay has been incurred due to the delay in completing the tests on completion.

- Sub-Clause 13 [Variations and Adjustments]

This Sub-Clause is reflective of the extension of time clauses under both the 1999 and 1987 forms of Red Book contract that offer entitlement to extension of time where variations instructed by the Engineer have induced delay to the Works.

- Sub-Clause 13.7 [Adjustment for Changes in Legislation]

This Sub-Clause is similar to that of Sub-Clause 70.2 of the FIDIC 1987 Red Book Contract in that it presents entitlement to the Contractor. The significant change or difference between Sub-Clause 70.2 and Sub-Clause 13.7 is that the later Sub-Clause presents entitlement to time.

- Sub-Clause 16.1 [Contractor's Entitlement to Suspend Works]

This Sub-Clause is similar to Sub-Clause 69.4 of the FIDIC 1987 Red Book contract in providing the Contractor with entitlement to slow down or stop the Works in instances where he has not received Certified Monies Due. Such a situation provides for entitlement to time and cost.

- Sub-Clause 17.4 [Consequences of Employer's Risks]

This clause is similar to Sub-Clause of the FIDOC 1987 Red Book Contract in providing the Contractor with Entitlement to both time and cost for the itemized Employers risks.

- Sub-Clause 19.4 [Consequences of Force Majeure]

This Sub-Clause provides for matters defined as being that of ‘Force Majeure’ that are similarly provided for under the 1987 FIDIC Red Book under Employers Risks.

2.2.3 - Provision for Dispute under the Red Book Contracts

This research has demonstrated that there is a common failure of both the Engineer and his Employer to administer the Conditions of Contract and provide the Contractor with his entitlements to both time and cost.

The Contractor must pay close attention to the many Sub-Clauses that define the Contractor’s route to recovering these entitlements via the defined dispute mechanisms stated under the Contract.

The FIDIC Red Books differ in their approach to claims under the contract as follows:

2.2.3.1 - The 1987 FIDIC Red Book - Sub-Clause 67.1 [Engineer’s Decision]

There are several aspects of this Sub-Clause that requires a clear knowledge and understanding of not only the Contract but that of “dispute” in its application.

The opening statement of Sub-Clause 67.1 states:

“If a dispute of any kind whatsoever arises between the Employer and the Contractor”

The importance of this statement is that prior to requesting an Engineer’s decision a “Dispute” must be crystalized and that the Engineer has an actual dispute to make a decision on.

In my experience it is often that the Contractor requests an Engineer’s decision where the dispute has not actually materialized and therefore the situation is simply open to challenge by the Engineer who if he ignores or refuses to issue a decision will be subject a possible jurisdictional challenge at a later stage of the dispute.

It is therefore of critical importance that the Contractor provides evidence that a dispute has crystalized.

Sub-Clause 67.1 then directs the Contractor to:

“in the first place, be referred in writing to the Engineer, with a copy to the other party. Such reference shall state that it is made pursuant to this Clause”

There are three potential “banana skins” here for which either one or collectively will invite a jurisdictional challenge to a dispute:

1. Failing to refer the dispute to the Engineer,
2. Failing to copy the Employer in on the referral, and
3. Failing to refer to Sub-Clause 67.1 when requesting the decision.

It may be considered that Article 473 of the UAE Civil Code and its position that “a claim must be heard” would imply that these conditions requesting an Engineers decision are possibly irrelevant, however my experience has found that failure to follow the requirements of a Contract present arguments that may prove fatal to the hearing of a claim through jurisdictional challenge.

Where a decision is requested by reference to Sub-Clause 67.1 likewise the Engineer is required to refer to this sub-clause when the Engineer provided notice of his decision. Again this is a highly important procedural requirement.

The second paragraph of Sub-Clause 67.1 provides that:

“Unless the Contract has already been repudiated or terminated, the Contractor shall, in every case, continue to proceed with the Works with all due diligence and the Contractor and the Employer shall give effect forthwith to every such decision of the Engineer unless and until the same shall be revised, as herein after provided, in an amicable settlement or an arbitral award.”

This research has shown that this second paragraph to Sub-Clause 67.1 presents the avenue to amicable settlement or arbitration and that this route is most commonly exploited by the Employer and his Engineer in either rejecting the request for a decision on the basis that the dispute has not been crystalized or that the contractual procedures in not serving notice in accordance with Clause 44 or Sub-Clause 67.1.

The Third paragraph of Sub-Clause 67.1 provides that:

*“If either the Employer or the Contractor be dissatisfied with any decision of the Engineer, or if the **Engineer fails to give notice of his decision** on or before the eighty-fourth day on which he receives the reference, then either the Employer or the Contractor may, on or before the seventieth day after the day on which he serves notice of such decision, or on or before the seventieth day after the day on which the said period of 84 days expires, as the case may be, give notice to the other party, with a copy for information to the Engineer, of his intention to commence arbitration”* (Bold and underline added).

The resultant effect of this Sub-Clause is that despite the Contractor having grounds for entitlement to time and cost under the Contract, the Engineer is under no obligation to provide a decision. This situation is supported by research in that the Engineer and Employer regularly fail to issue decisions and therefore invite the provisions of amicable settlement or arbitration.

The Engineer has in no way failed to meet with his obligations under the Contract here as the Contract accepts that the Engineer may not issue a decision. Despite the Engineer's obligations towards the Parties under Sub-Clause 2.6 [Engineer to Act Impartially] it is generally accepted by all including FIDIC that the Engineer is biased towards the Employer, a point clarified under Sub-Clause 3.1 [Engineer's Duties and Authorities] part (a) of the FIDIC 1999 Red Book(s) which states *“the Engineer shall be deemed to act for the Employer”*.

Sub-Clause 67.2 [Amicable Settlement]

Sub-Clause 67.2 provides that:

“the parties shall attempt to settle such dispute amicably before the commencement of arbitration”

Despite this contractual requirement research and experience has supported the fact that amicable settlement at this stage is often a mere time wasting exercise on projects in the UAE.

It is often the case that some discussions will take place with little to no movement in position from the Employer and his Engineer and as such another 56 days are added to the

previous 84 days of the dispute(s) along with the time from notification of the delay to that current time as stated within the Contractors Final Particulars.

My experience as to the application of sub-Clause 67.2 is to ensure that the Employer has been invited to attempt to reach amicable settlement and that this invitation is in writing so as to avoid a jurisdictional challenge regarding the dispute procedures not being followed.

This research has supported the fact that amicable settlement rarely is achieved at this juncture and that the parties more commonly move to arbitration.

Sub-Clause 67.3 [Arbitration]

Sub-Clause 67.3 of the 1987 FIDIC Red Book constitutes the “Arbitration Agreement” for which the parties to the Contract are required to provide the detail upon which arbitration shall be performed. This is of particular importance in order to avoid an “Ad Hoc” arbitration.

Article 203 (1) UAE Federal Code of Civil Procedures (CPC) requires that arbitration cannot proceed without agreement between the parties.

Such details should constitute:

- a) The seat of arbitration,
- b) The language of arbitration,
- c) The institutional rules of arbitration
- d) The number of arbitrators to be appointed,
- e) Interim and injunctive relief,
- f) Limitation periods,
- g) Substantive law,
- h) State immunity.

Again Sub-Clause 67.3 provides for:

“Any dispute in respect of which:

- (a) The decision, **if any**, of the Engineer has not become final and binding pursuant to Sub-Clause 67.1, and (bold and underline added)

- (b) Amicable settlement has not been reached within the period stated in Sub-Clause 67.2.

Again Sub-Clause 67.3 confirms that the Engineer is not obliged to issue a decision and in doing so promotes and advances the dispute(s) down the path of arbitration. There is simply no obligation placed upon the Employer and his Engineer to resolve disputes promptly.

Sub-Clause 67.4 [Failure to Comply with Engineer's Decision]

Sub-Clause 67.4 in the first instance relates itself to paragraph four of Sub-Clause 67.1 which states:

“If the Engineer has given notice of his decision as to a matter in dispute to the Employer and the Contractor and no notice of intention to commence arbitration as to such dispute has been given by either the Employer or the Contractor on or before the seventieth day after the day on which the parties received notice as to such decision from the Engineer, the said decision shall become final and binding upon the Employer and the Contractor.”

Sub-Clause 67.4 subsequently allows the party for whom the decision was made to commence arbitral proceedings against the defaulting party.

It would therefore appear to be of significant importance that the Contractor issues notice of intention to commence arbitration within the prescribed time frame as to prevent losing his entitlement.

It is therefore reasonable to conclude that the FIDIC 1987 Red Book dispute mechanisms do not promote speedy resolution of disputes and in doing so promote an adversarial approach to contracting.

2.2.3.2 - Conditions of Contract for Construction For Building and Engineering Works Designed by the Employer First Edition 1999 (The FIDIC 1999 Red Book)

Dispute Mechanism

The FIDIC 1999 New Red Book in its more concise drafting made some significant changes to that of the 1987 Red Book with regards to the contractual mechanisms regarding dispute.

Clause 20 - Claims, Disputes and Arbitration

In a revision to Clause 44 and Clause 53 of the 1987 Red Book, FIDIC under the 1999 New Red Book compiled the claims and dispute mechanism together under Sub-Clause 20.1 [Contractor's Claims].

As with the 1987 Red Book the 1999 Red Book provides a procedure for serving notice for time and cost that is subject as a condition precedent to "Time Barring" of the Contractor's claims if notice is not served within the specified notice period.

The Contractor is obliged to serve interim and final particulars to a claim within the specified 42 day period and the Engineer is obliged to respond to this claim in the following 42 day period specified.

The issue here is that there is no contractual implication towards the Engineer if he fails to respond after the 42 day period. Furthermore the Engineer is directed to:

"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."

The significant issue and oversight by FIDIC in this matter is that Sub-Clause 3.5 [Determinations] does not provide any time frame in which the Engineer has to do this!

Sub-Clause 3.1 (e) of the FIDIC 1999 New Red Book makes a significant change in the accountability of the Engineer stating *"the Engineer is deemed to act for the Employer"*.

Along with changing their position from that of Sub-Clause 2.6 of the 1987 Red Book [Engineer to Act impartially] and that of the Engineer having no time frame under Sub-Clause 3.5 in which to issue his decision, the usual outcome as proven by research is that no such decisions are made!

Due to the Engineer's position being clarified under Sub-Clause 3.1 (e), FIDIC introduced the use of a DAB towards finding a quicker and fairer method of dispute resolution.

2.2.4 - The FIDIC 1999 Red Book and “DAB” ¹¹

11. See Bunni N *The FIDIC Forms of Contract Third Edition* Chapter 26 26.1 Introduction – Bunni N states “It became clear during the 1980’s and early 1990’s that society requires and needs not only appropriate dispute resolution mechanisms but also a method of avoiding disputes in the first place. It was against this background, explored more fully in Section 26.3 below, that FIDIC started with the introduction of Dispute Boards in the Orange Book in 1995” 26.3 provides an informative background as to the evolution of Dispute Boards where it states “Employer’s and contractors began the search for a cost-effective and fast method of settling disputes “. It is notable that the FIDIC 1999 Red Book fails in this regard. In Chapter 26 under 26.2 Main Advantages of the dispute Board – Bunni presents a comprehensive list of advantages as to the use of Dispute Boards that further illustrate FIDIC’s failure in the UAE. Part (k) of 26.2 states “When a disagreement or dispute does arise, it is given early attention and addressed contemporaneously. Disagreements are settled as they arise rather than being left to fester and develop into intransigent disputes.” Unfortunately this is the case particularly in the Middle East here as stated “Delays occur which can result in aggravation, acrimony and the development of entrenched views.”

The following Sub-Clauses are relevant to the use of a Dispute Adjudication Board (DAB):¹²

1. Sub-Clause 20.2 [Appointment of the Adjudication Board]
2. Sub-Clause 20.2 provides the process for appointing the DAB or DAB member with an option of either one or three DAB members. In the case of three members one shall be chosen as the chairman.

Alternatively a list may be provided of “potential members” for selection.

3. Sub-Clause 20.3 [Failure to Agree Dispute Adjudication Board]
4. Sub-Clause 20.4 [Obtaining Dispute Adjudication Board’s Decision]
5. Sub-Clause 20.5 [Amicable Settlement]
6. Sub-Clause 20.6 [Arbitration]
7. Sub-Clause 20.7 [Failure to Comply with Dispute Adjudication Board Decision]
8. Sub-Clause 20.8 [Expiry of Dispute Adjudication Board’s Appointment].

This research has shown that in the majority of instances in projects utilizing the FIDIC 1999 New Red Book, the above clauses are stricken from the Contract and the Employer

falls back towards the dispute mechanisms of the FIDIC 1987 Red Book and that of amicable settlement prior to arbitration.

The UAE courts (unlike English and Welsh common law) do not recognize either the DAB or statutory adjudication and as such it serves little purpose in maintaining it under the Contract.

A DAB decision in the UAE cannot be enforced by the UAE courts and as such a DAB decision can only be maintained by agreement with the parties to the contract.

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12. See N Bunni *The FIDIC Forms of Contract Third Edition* Chapter 26 Page 610 26.6 Dispute Adjudication Boards under the FIDIC contracts. N Bunni discusses the development of the FIDIC suit of contract with reference to Dispute Adjudication Boards.

2.2.5 -Dispute Resolution encountered in FIDIC and the Application in the UAE

There are various forms of alternate dispute resolution available in the UAE, however as the most common forms of contract utilized in the UAE are FIDIC contracts or bespoke contracts based on FIDIC, the following are the options made available under these contracts:

1. Amicable Settlement,
2. Dispute Adjudication Board (DAB), and
3. Arbitration.

2.2.5.1 - Amicable Settlement

As previously mentioned Sub-Clause 67.2 of the FIDIC 1987 Red Book and Sub-Clause 20.5 of the FIDIC 1999 Red Book call for amicable settlement to be attempted (or at least offered) prior to escalating a dispute to arbitration.

Amicable settlement was introduced in the 1987 FIDIC Red Book however research has shown that despite its distinct advantages with regards to speedy cost effective dispute resolution such processes that could involve formal Mediation or Conciliation are rarely applied.

Throughout the course of my studies the various forms of Mediation and Conciliation were discussed and identified as follows;

2.2.5.1.1 – Mediation and Conciliation in the UAE

Mediation / Conciliation in UAE see Professor Aymen Masadeh who states:

“There is no general law for mediation in the UAE. There are the Federal Law No (26) of the 1999 concerning the establishment of conciliation and settlement committees at federal courts and the Procedure of the Conciliation and Settlement Committee (Ministerial Resolution 133 of 2001).”

Mediation – An International Review see www.tregaskismediation.com

13. See Professor Aymen Masadeh paper on Mediation and Conciliation in the UAE.

Dispute Adjudication Board in the UAE

2.2.5.2 - PHILOSOPHY AND PURPOSE OF DISPUTE ADJUDICATION BOARDS

Due to the increase in large scale construction projects and the increase in disputes involving large payment transactions, FIDIC identified a need to develop a process of dispute resolution that not only resolved disputes quickly but also looked to avoid disputes generally.

The use of dispute Boards was introduced by FIDIC in its 1995 “Orange Book” (published in 1996) at around the same time as statutory adjudication was introduced in the UK by the Housing Grants, Construction and Regeneration Act 1996 following the Latham Report (Constructing the teams 1994) which is presently the most widely used form of dispute resolution in the UK construction industry. It was the 1996 supplement to the 1992 FIDIC Fourth Edition of the Red Book that introduced the concept of Dispute Adjudication Board

(DAB) into the Red Book. Based on the USA concept of the Dispute Resolution Board (DRB) the DAB provided for a temporarily binding decision on a dispute rather than a recommendation.

2.2.5.3 - ENFORCING A FIDIC DAB DECISION IN THE UAE

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The reluctance by employers in the UAE to move away from the more common 1987 FIDIC Red Book and the “impartial Engineer” to that of a DAB and the position taken by employers that the payment for a standing DAB is not cost effective are two of the reasons as to why the use of a DAB in the UAE is uncommon. Again the point of dispute avoidance does not appear to be understood in the region.

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14. See T A Morris assignment paper 16 March 2015 “The Enforceability of the FIDIC Red Book In The UAE”

The UAE has not had a positive experience of the use of DABs due to the procedural rules specified under FIDIC. A paper entitled “*The influence of Dispute Boards around the world: the Middle East experience*” by Stephen Hibbert¹⁵ made note of the significant time taken by DABs to issue decisions stated as being between “*100 and 300 days to complete*”, and referred to employers suing DAB members personally and asking the courts to reverse decisions.

Unlike the UK where statutory adjudication renders an adjudicator’s decision binding until or unless overturned by arbitration or a court decision, it is typical to find that the UAE courts do not involve themselves with decisions made in relation to Sub-Clause 20.4 of the FIDIC Red Book as adjudication is (as previously stated) a purely contractual process with which the UAE courts are unwilling to concern themselves until and unless the matter proceeds to arbitration.

2.2.5.4 - Arbitration in the UAE ¹⁶

My experience of arbitration in the UAE has come about through projects affected by suspension or closure via 2009 with the impact of the global financial crisis. Up until 2009 it was notable that little attention was brought upon the conditions of contract.¹⁷

Post 2009 the construction industry in the UAE went into freefall with the parties to the contract(s) running to investigate the terms and conditions of the contract's they had entered into.

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15. See N Bunni paper *Dispute Boards in the Middle East* Bunni/DRBF Conference Paris 3rd May 2013 – Bunni states “*But unfortunately, whilst Dispute Avoidance is now accepted as an essential feature of the role of Dispute Boards, it is not yet accepted in the Middle East, as illustrated by the constraints placed in the Abu Dhabi Conditions of Contract of 2007 and the rejection of the standing DAB*”. In part 7 of this paper “*Reluctance of Employers in the Middle East to use the 1999 Forms*”, Bunni provides several reasons as to why the use of a DAB has proven unsuccessful in the region stating “*The use of the DAB has resulted in a small number of court cases with decisions that reflected badly on the use of DAB procedures*”.
 16. See Brewer Smith Brewer Arbitration in the UAE <http://bsbgulf.com/blog/arbitration-in-the-uae/>
 17. See Jane Bertenshaw “Negotiating Contracts in the Construction Industry” <http://www.tamimi.com/en/magazin/law-update/section-6/june-4/negotiating-contracts-in-the-construction-industry.html>

As the UAE experienced an upturn in economic growth post the financial crisis it also sought more effective and transparent dispute mechanisms and according to Tamimi & Co ¹⁷ “*The UAE increasingly favored arbitration as a suitable mechanism for alternative dispute resolution*”.

The UAE proffers several institutions where arbitration may be sought:

- Dubai International Financial Centre (DIFC),
- Dubai International Arbitration Centre (DIAC),
- Abu Dhabi Commercial Conciliation and Arbitration Centre (ADCACR),
- Dubai International Financial Centre / London Court of International Arbitration Centre (DIFC- LCIA Arbitration Centre).

Research and experience has proven that arbitration is the most common form of alternative dispute resolution in the UAE and is the form of dispute resolution identified under the majority of construction contracts in the UAE.

In their article drafted May 2014 Tamimi & Co stated:¹⁸

“The Ministry of Economy has released various drafts of the proposed UAE Federal Arbitration Law (the “Draft Law”); the latest draft was issued by the Ministry in 2013. The Draft Law marks the UAE’s desired modernization of its legislation, in effect replacing Articles 203 to 218 of the Civil Procedure Code that are currently in force, in order, among other things, to fully comply with its obligations under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Whilst enactment of the Draft Law is still pending, this latest release manifests the UAE’s intentions to introduce a modern legislative framework for arbitration in the UAE”.

At present the Ministry of Economies draft still remains as a draft.

18. See John Gaffney & Dalal Al Houti ‘Arbitration in the UAE: Aiming for excellence.

CHAPTER THREE: RESEARCH AND ANALYSIS

This chapter shall discuss the findings of the research results conducted for the purpose of this paper and connects with the methodology previously proposed in collating the data.

The data is presented in a format that allows for a critical evaluation in supporting my own experience of dispute management whilst working for Arabtec Construction LLC.

3.1 - Field Work

The data was issued and collected through an online questionnaire issued to 100 professionals from either a contracting, claims consultancy or legal entities all operational in the UAE. The questionnaire presented thirty questions that were looking to define as to:

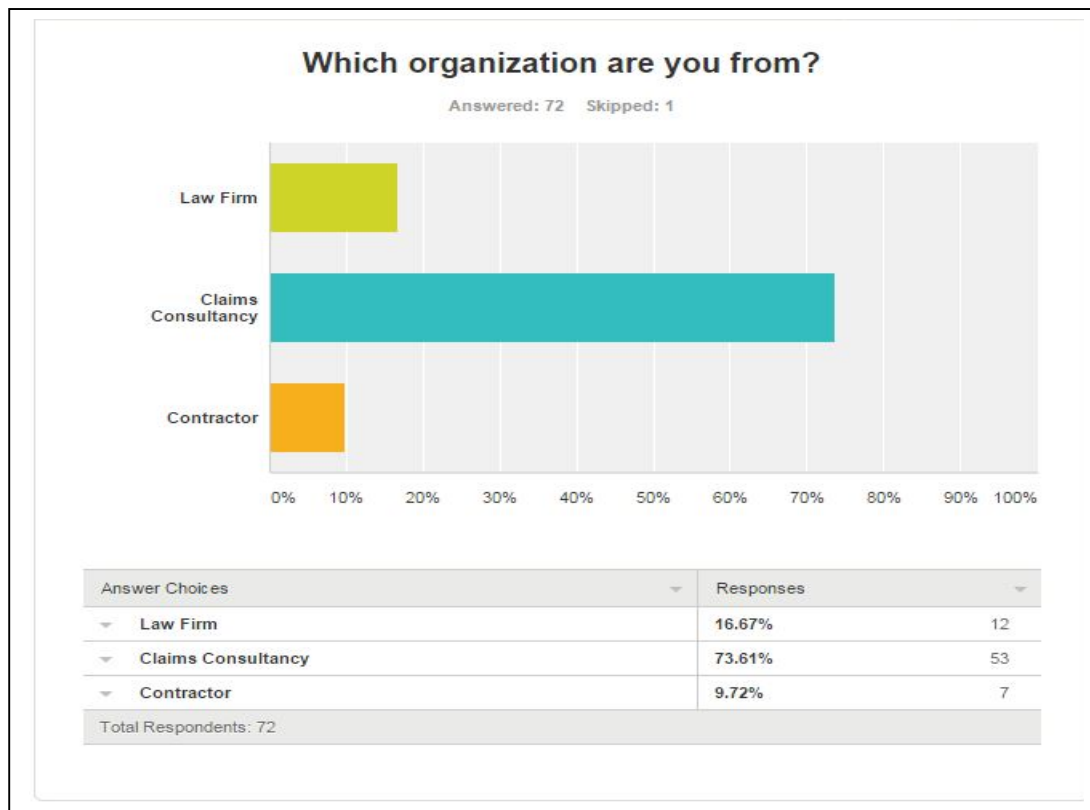
- a) The common causes of contractual delay and dispute in the UAE,
- b) How the contract(s) are administered, and
- c) What the most common outcomes of dispute resolution are being applied in order to address such disputes.

The response was received from seventy three (73) of the recipients and these responses analyzed in order to support this research.

3.2 - Survey Results

The survey results illustrated here provides the data for discussion and analysis:

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erstand the professional discipline responding to the survey. The survey invited in the main law firms and claims consultancies located within the UAE while inviting some on the main contracting companies to participate.

In order as to not present an imbalanced survey, no Employers or Engineers were invited nor any member of Arabtec Construction LLC.

The following Law firms participated:

- Pinsent Mason
- Reed Smith
- Clyde & Co
- Tamimi
- Keatings Chambers

The following Claim Consultancies participated:

- Blackrock,

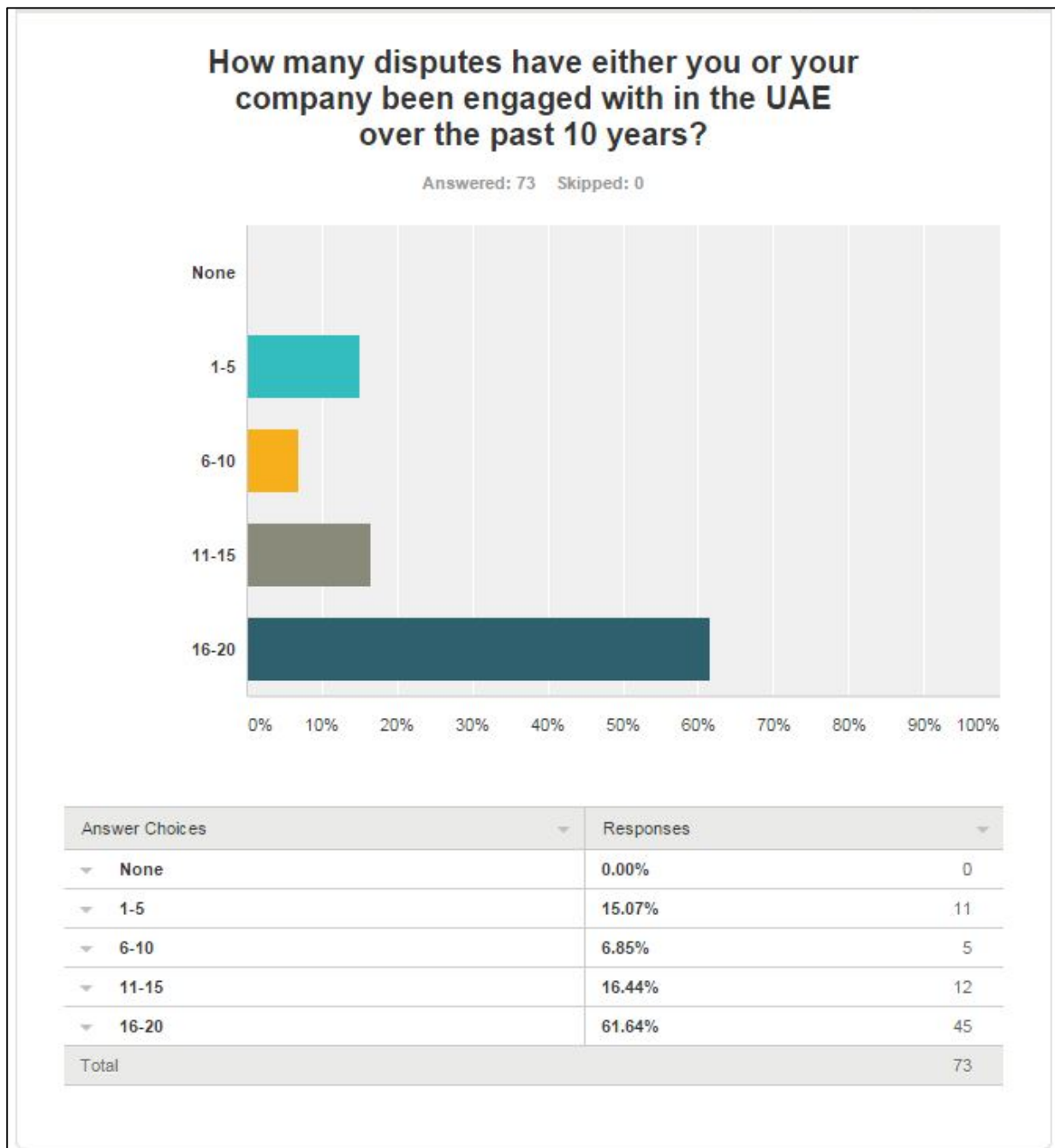
- Navigant,
- Driver,
- GMCS,
- HWF, and
- Hill International

The following Contractors participated:

- DCC,
- Carillion,
- Habtour Leighton, and
- Multiplex.

As can be seen the majority of responses came from the Claims Consultants.

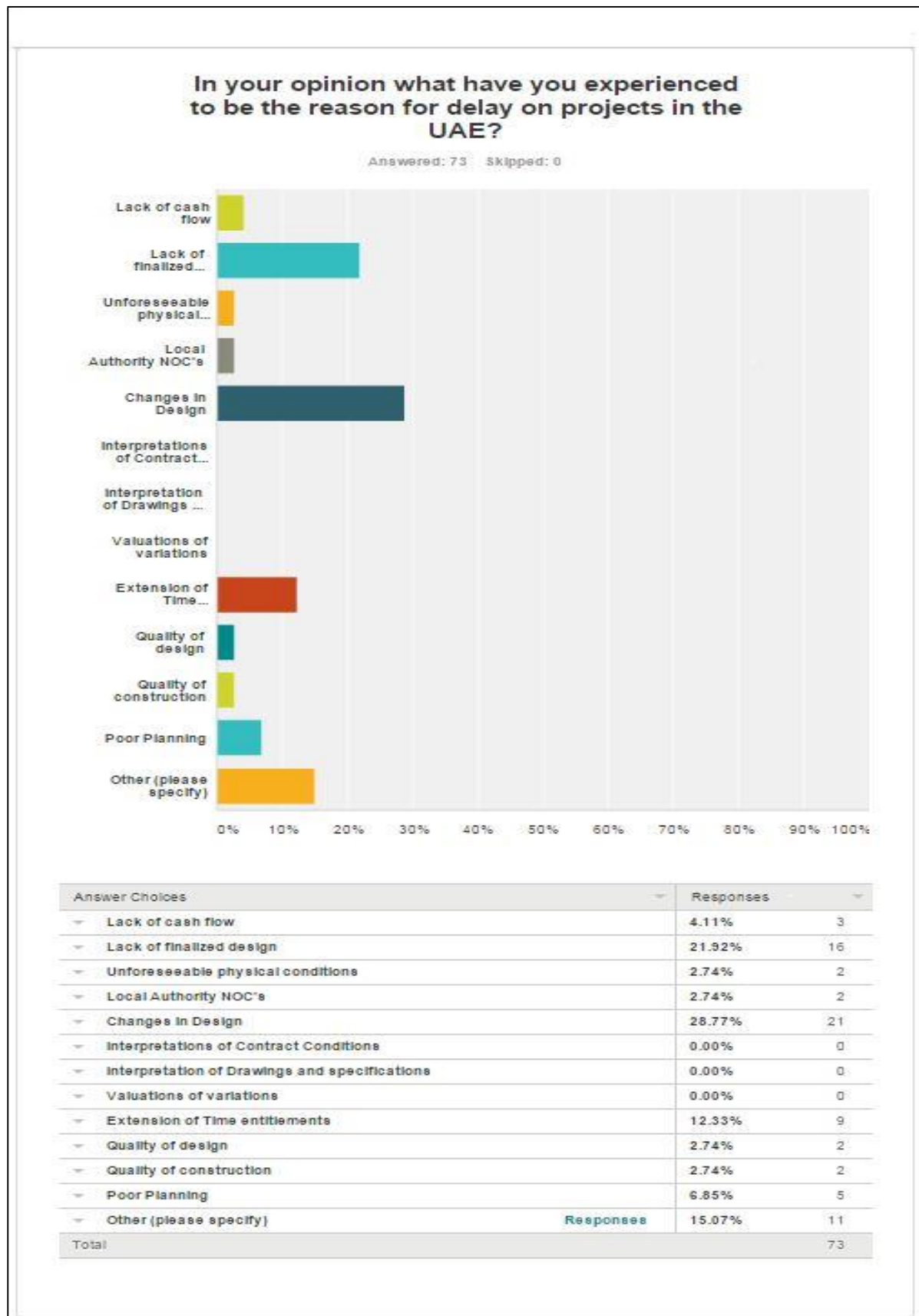
3.2.2 - Question- 02



Question two was set to understand the extent of which these professionals were engaged in. Alarminglly the majority of responses highlighted that they had been involved with between sixteen (16) and twenty (20) disputes over the past ten years.

Noting that this survey only concerns disputes within the UAE, this would correlate with my experience with Arabtec where around sixty percent of projects undertaken in the UAE have resulted in or are currently in dispute.

3.2.3 - Question-03



Question Three was set to understand the reasons behind the delays to the projects. What was surprising here was that only 4.11% of the respondents highlighted cash flow as being a major cause of delay. I would presume the reasoning for this is that Claims Consultants and lawyers would not particularly see the impact of poor cash flow upon the project, whereas the Contractor's would see this as being key.

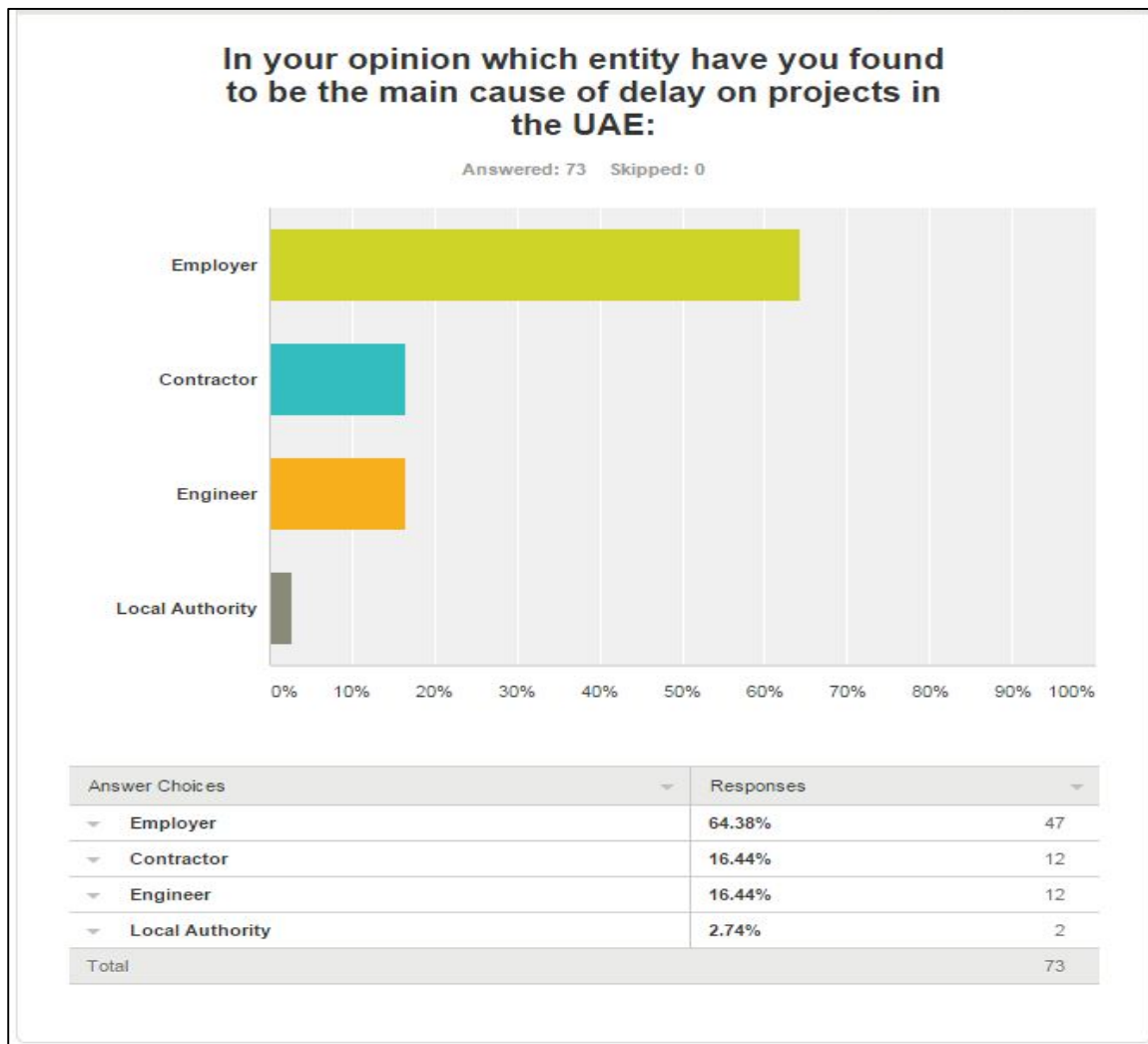
The Four key areas picked up upon by the claims consultants and lawyers was:

1. The impact of late or incomplete design 21.32%,
2. Changes in design 28.77%,
3. Extension of time entitlements 12.33%, and
4. Poor planning 6.85%

15.07% of the respondents commented that all of the matters raised in the survey had in their experience been relevant, however if they could choose amongst these matters it would be the delay in the design causing delay to the project for which in the absence of any response to prolongation there was impact on the Contractor's cash flow.

Question three supports my experiences in Arabtec as late decisions and the lack of finalized design are the most common causes of delay encountered on the projects and the failure by the Employer and the Engineer to compensate the Contractor in time and money has impacted the projects and has led to dispute.

3.2.4 - Question-04



Question four was set to establish the party most commonly found to be root cause of delay.

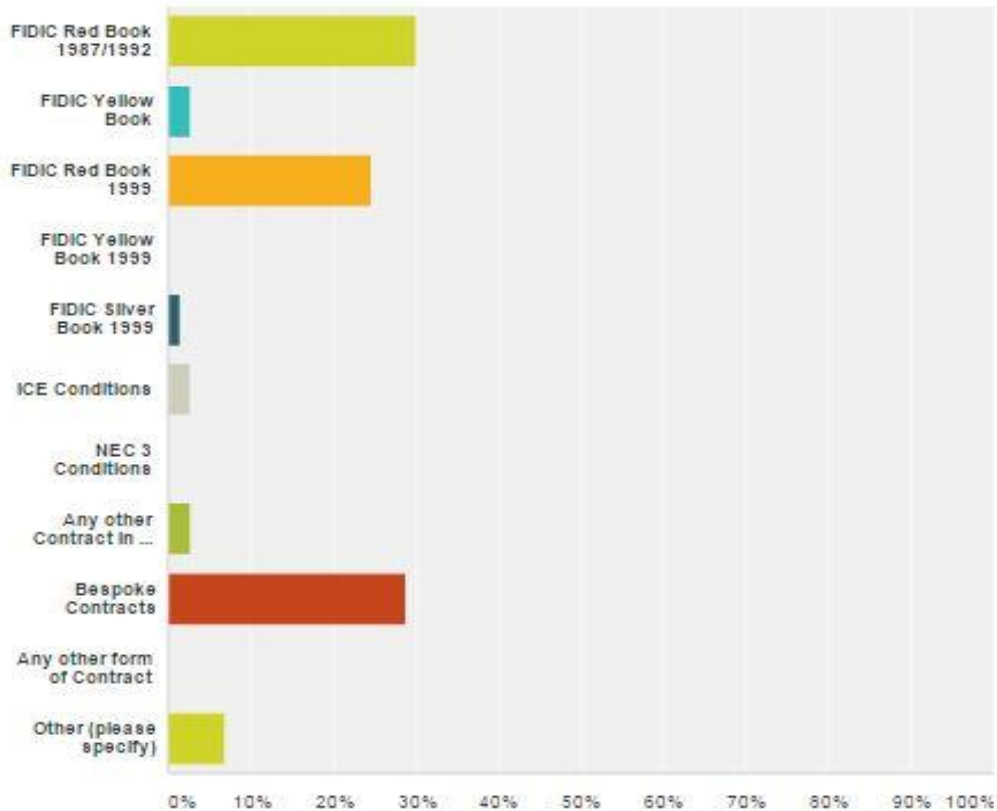
This was quite clear as can be seen 64.38% of delay was found to be the responsibility of the Employer with an additional 16.44% to be the responsibility of the Engineer. By coincidence the Contractor was seen as being equally as responsible for delay as the Engineer.

My experience concurs with these survey results as what is commonly found and accepted is that as the Engineer is directly employed by the Employer, his allegiance is not to be as defined under Sub-Clause 2.6 of the FIDIC Red Book to “Act Impartially” but is as is stated under Sub-Clause 3.1 (a) of the 1999 First Edition Red Book, to be “deemed to act for the Employer”.

3.2.5 - Question-05

What form of Contract has been applied on projects presided by you in the MENA region? - Please tick the one most commonly used.

Answered: 73 Skipped: 0



Answer Choices	Responses
FIDIC Red Book 1987/1992	30.14% 22
FIDIC Yellow Book	2.74% 2
FIDIC Red Book 1999	24.66% 18
FIDIC Yellow Book 1999	0.00% 0
FIDIC Silver Book 1999	1.37% 1
ICE Conditions	2.74% 2
NEC 3 Conditions	0.00% 0
Any other Contract in the FIDIC suit of Contracts	2.74% 2
Bespoke Contracts	28.77% 21
Any other form of Contract	0.00% 0
Other (please specify)	6.85% 5
Total	73

Question Five was set to have a broader understanding as to what forms of contract are commonly used in the MENA region when compared to the UAE and as such to ascertain if this research supported my experiences whilst working for Arabtec.

The responses received clearly illustrated that:

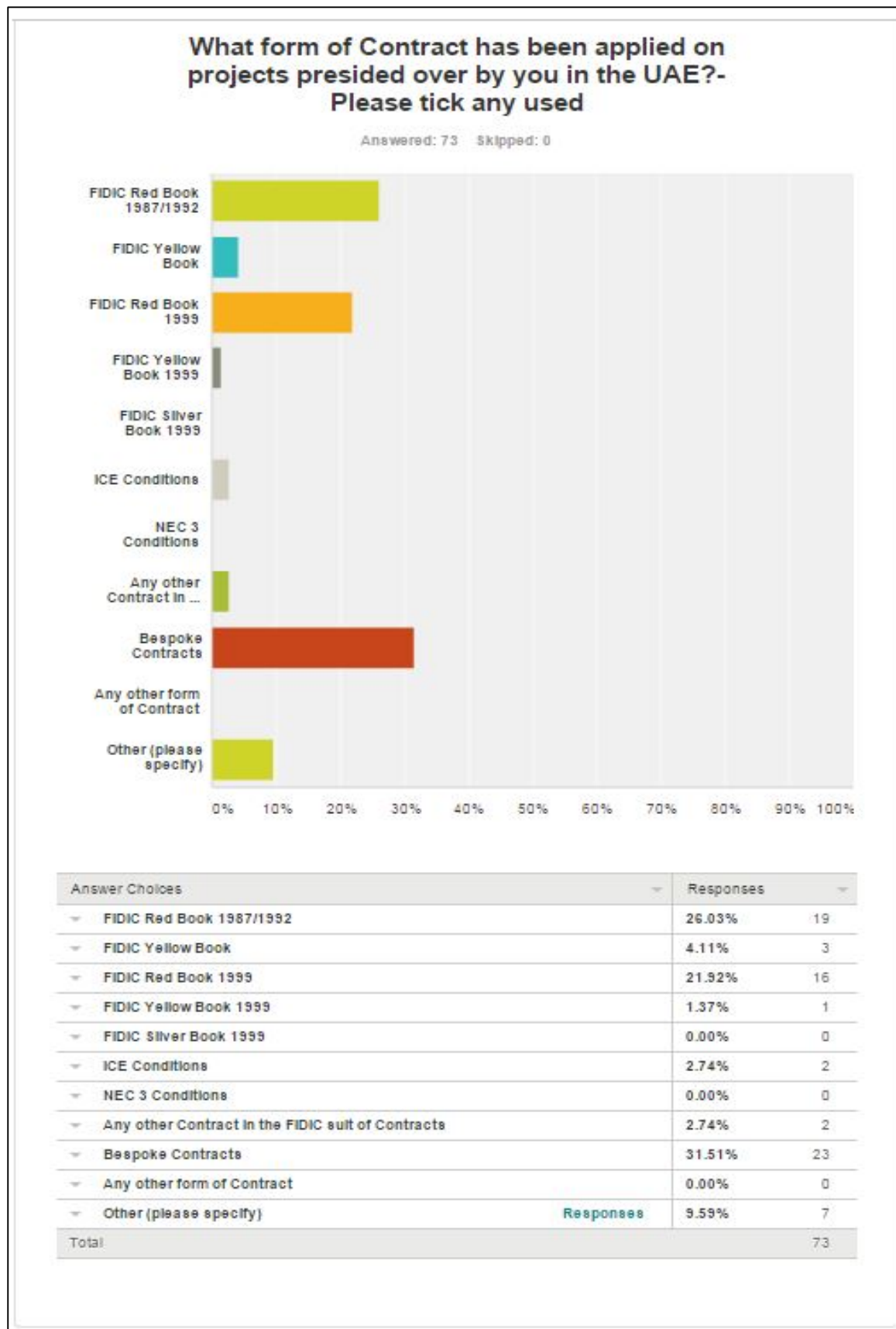
1. The most commonly used form of Contract at 30.14% is the FIDIC 1987 Red Book,
2. The FIDIC First Edition 199 form of Contract received a response as being 24.66%,
and
3. Bespoke contracts contained 28.77% of the survey.

It was notable from comments received that the bespoke contracts were those primarily based on the 1987 FIDIC form of Contract.

This research supports my experience with Arabtec and distinctly illustrates that Employers are either not being made aware as to other forms of contract such as the NEC 3 or the FIDIC 1999 Yellow Book or are simply being talked out of applying these alternative forms.

In answer to this question, my experience and research supports that the Engineers general lack of knowledge of the forms of contract on the market and the subsequent best procurement track for the form of contract to be utilized is responsible for the common approach to utilizing a form of the FIDIC Red Book.

3.2.6 - Question-06



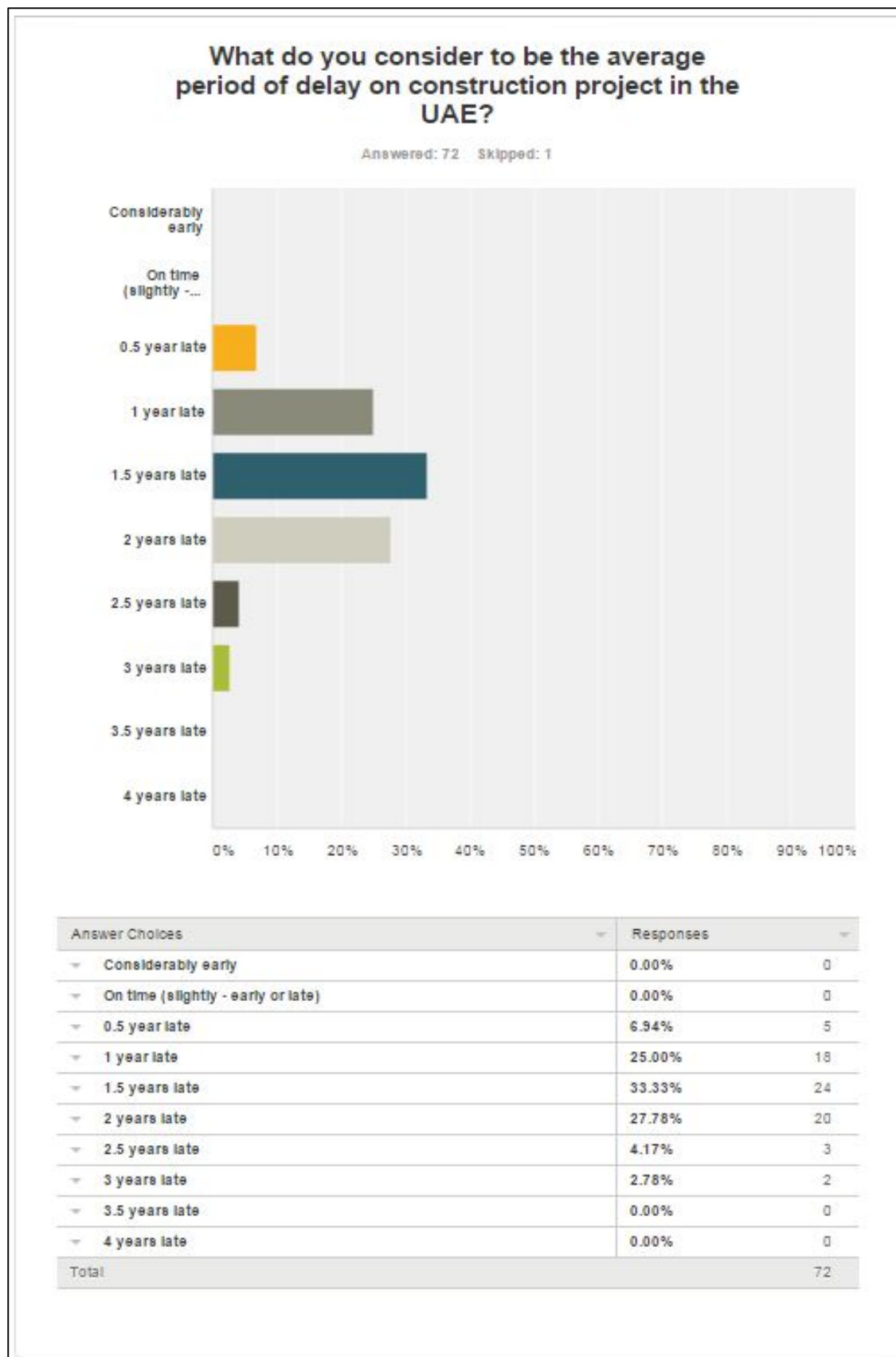
Question six presented a similar question to that of question Five but this time the UAE region was the focus of the question.

What the survey has illustrated is that apart from a form of the Yellow book accounting for 5.48% of usage, 79.46% of the respondents highlighted either the 1987 FIDIC Red Book, the 1999 First Edition Red Book, or a bespoke version of contract based on either of these two forms as being the most common form of contract used.

As a direct result of the research and responses received this paper has focused on both the 1987 FIDIC Red Book and the 1999 First Edition Red Book when reviewing the forms of entitlement contained therein and the procedures set for recovering entitlement to time and cost and if found necessary, that of the dispute mechanisms to be followed under these contracts.

The responses received to question six support my experiences with Arabtec.

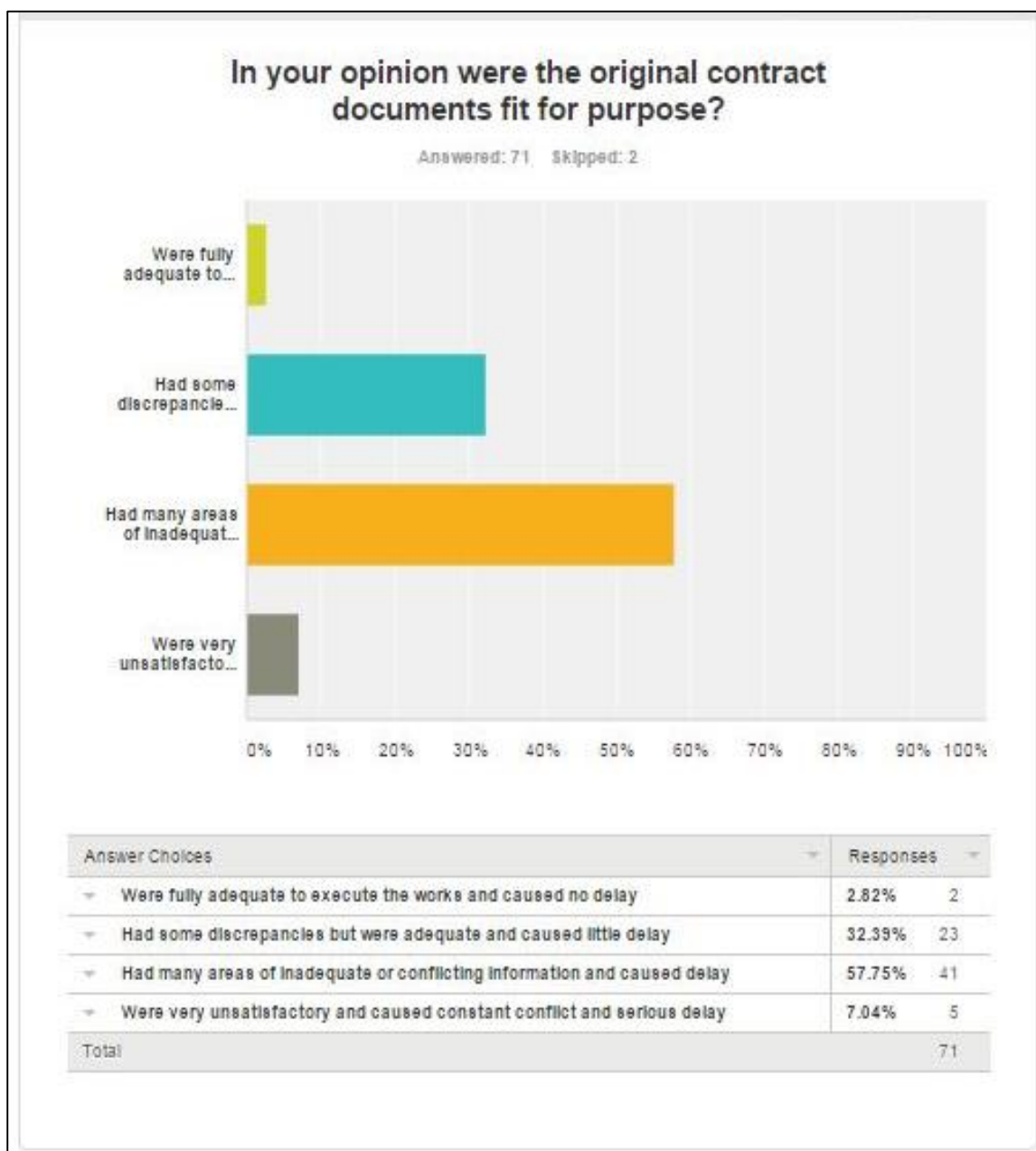
3.2.7 - Question-07



Question seven was set to understand the periods of contractual delay experienced on projects in the UAE. Alarming not one participant had any experience of any project completing either on or before time.

Research confirms that project delay in the UAE runs between that of six months and three years. The most common period of delay is one and a half years. This being represented as 33.33% of the survey.

3.2.8 - Question-08



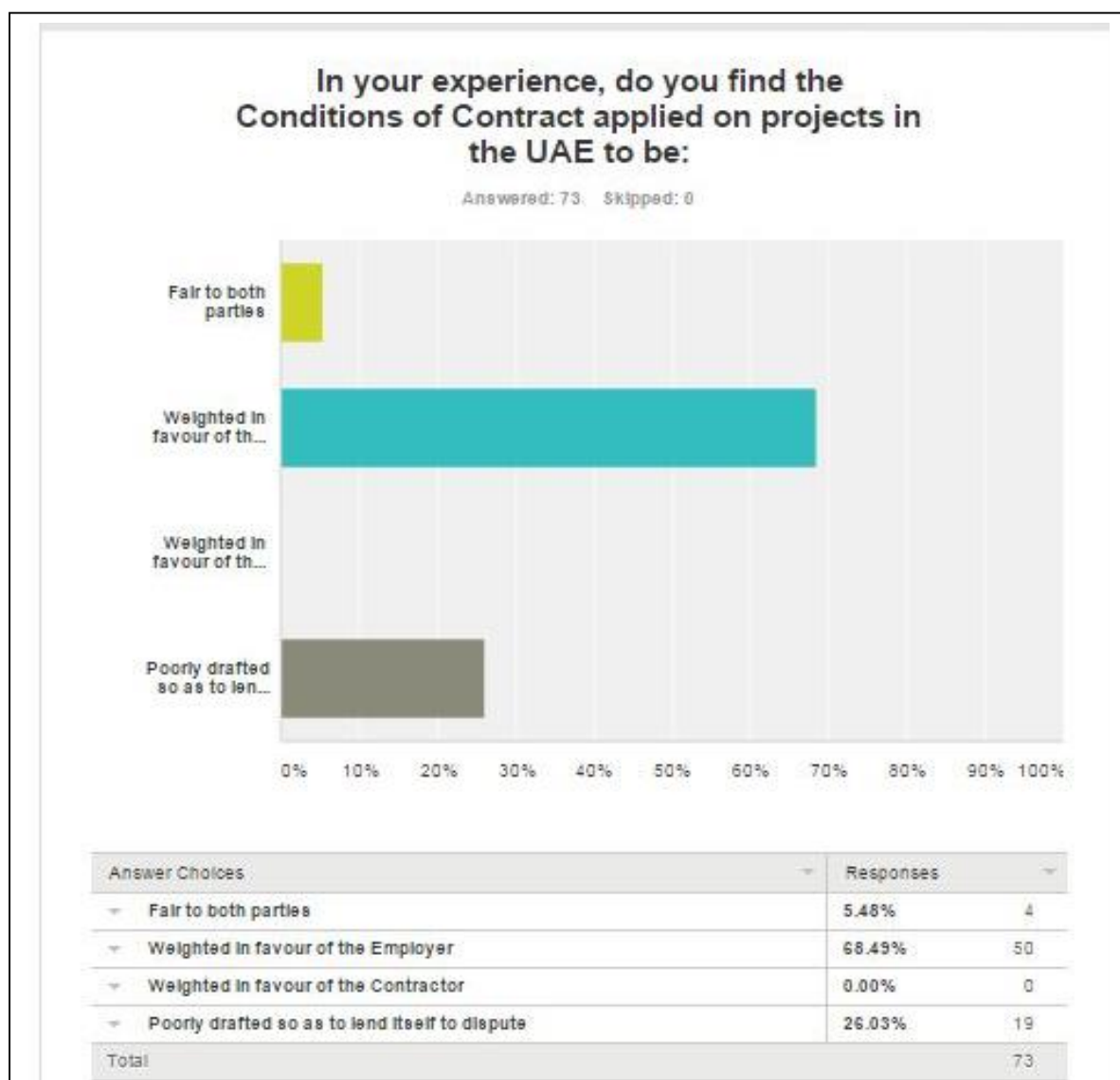
This question sets out to answer the question as to suitability of the contract and its effectiveness in the parties being able to rely on the terms and conditions therein when administering it on the project.

Research shows that only 2.82% of contracts issued in the UAE are considered to be fully adequate for the execution of the works.

The most damning result here was that 57.76% of contracts encountered within the UAE “had many areas of inadequate or conflicting information and caused delay”.

What the research clearly illustrates is that there appears to be a lack of knowledge and / or understanding as to the numerous options available towards selecting the appropriate contract for a particular project. Whether this is through a lack of contractual knowledge or experience is debatable however a possible factor here could be that of culture.

3.2.9 - Question-09



The response to question nine possibly provides the answer as to why projects undertaken in the UAE end in dispute.

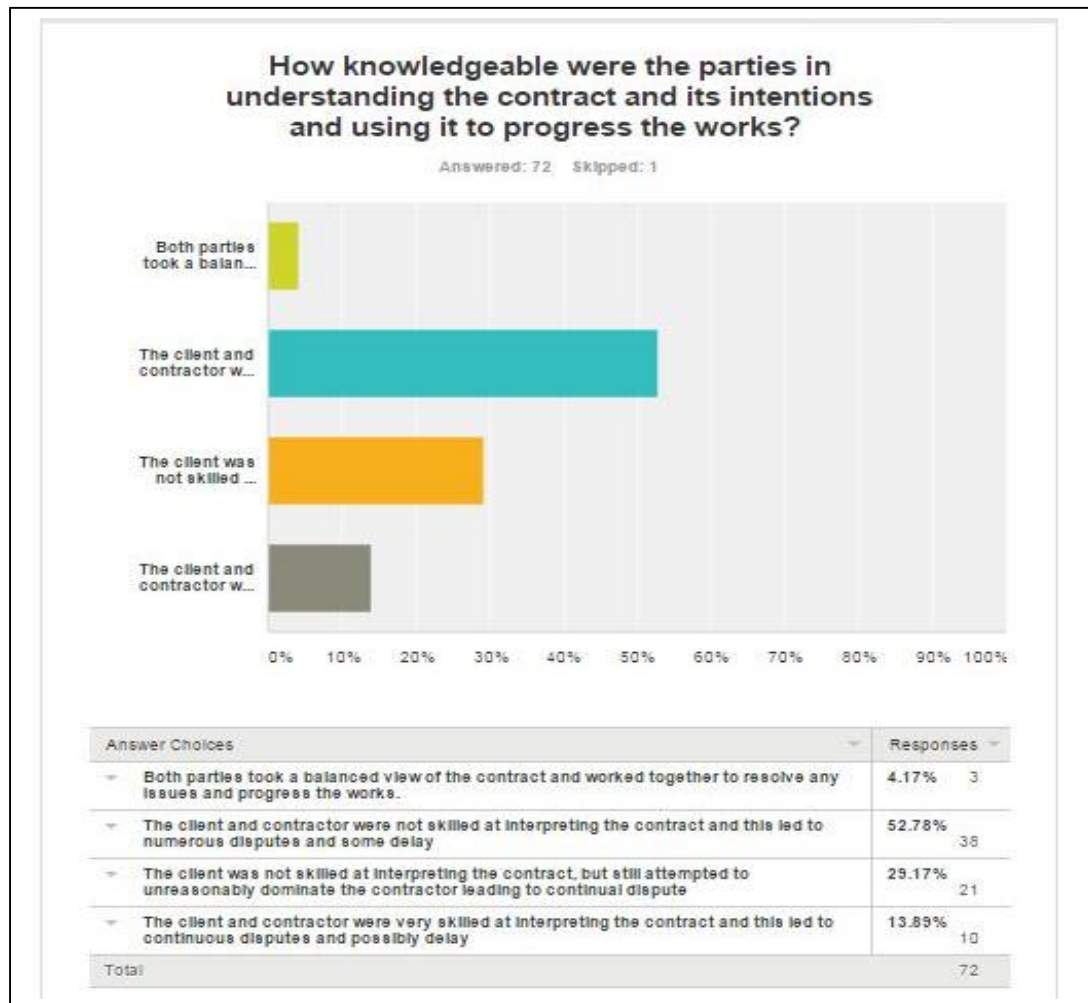
With an astonishing 68.49% of respondents highlighting that the Conditions of Contract were weighted in favour of the Employer and another 26.03% recording that the contracts were poorly drafted so as to lend itself to dispute, this displays that 94.52% of contracts are drafted in a manner that would encourage dispute.

Only 5.48% of contracts were seen or reported to be fair to both parties, whilst not one respondent considered that the contract would be weighted in favour of the Contractor.

This research supports my own experience whilst operating as Contracts Director for Arabtec as the majority of contracts received were in fact weighted in favour of the Employer.

During the “Boom” period in the UAE the major risk factors were accommodated through high prices and margins with little attention being born upon the Conditions of Contract. In recent years construction prices and margins have plummeted with Employers approaching Contractors on a take it or leave it basis. Again this approach only lends itself to dispute.

3.2.10

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Question-
10

Question 10 was set to research the knowledge and skill level of the parties to the contract and their ability to apply the contract to the works.

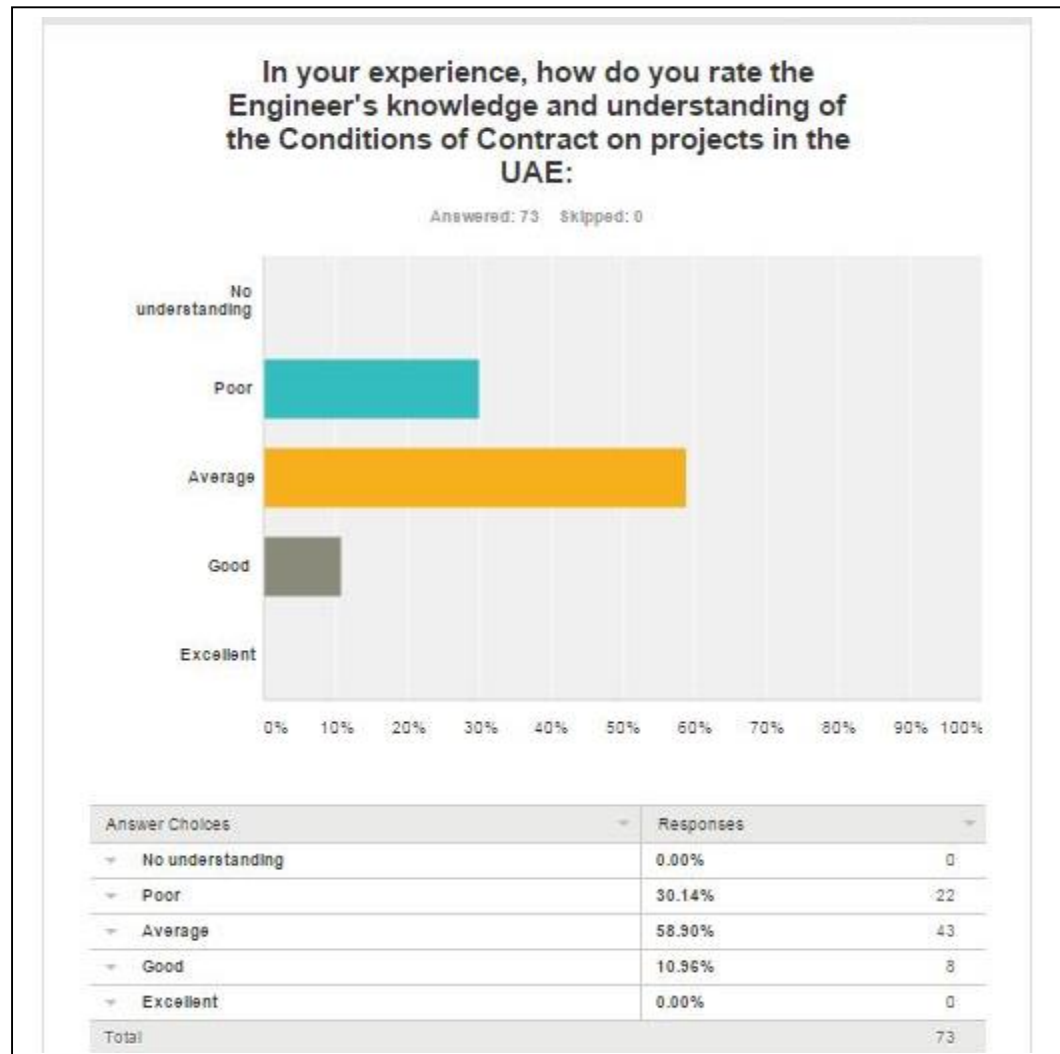
Research illustrated that only 4.17% of the people researched considered that both parties to the contract maintained a balanced view of the contract and looked to resolve disputes whilst the works progressed.

52.78% of respondents considered that neither party were skilled in contract which led to disputes whilst a further 29.17% of respondents considered that despite the clients lack of knowledge of contract, the contract would be used in a manner to prevent the Contractor from receiving his entitlements.

13.89% of respondents experienced that where both parties were skilled in contract this still resulted in dispute. My experience of this has been where the design has been changed or simply was not finalised at time of tender and as such the Engineer and Employer do not wish to be held responsible for the final outcome of this.

Article

3.2.11 - Question-11



Question eleven questioned the Engineer's understanding of contract.

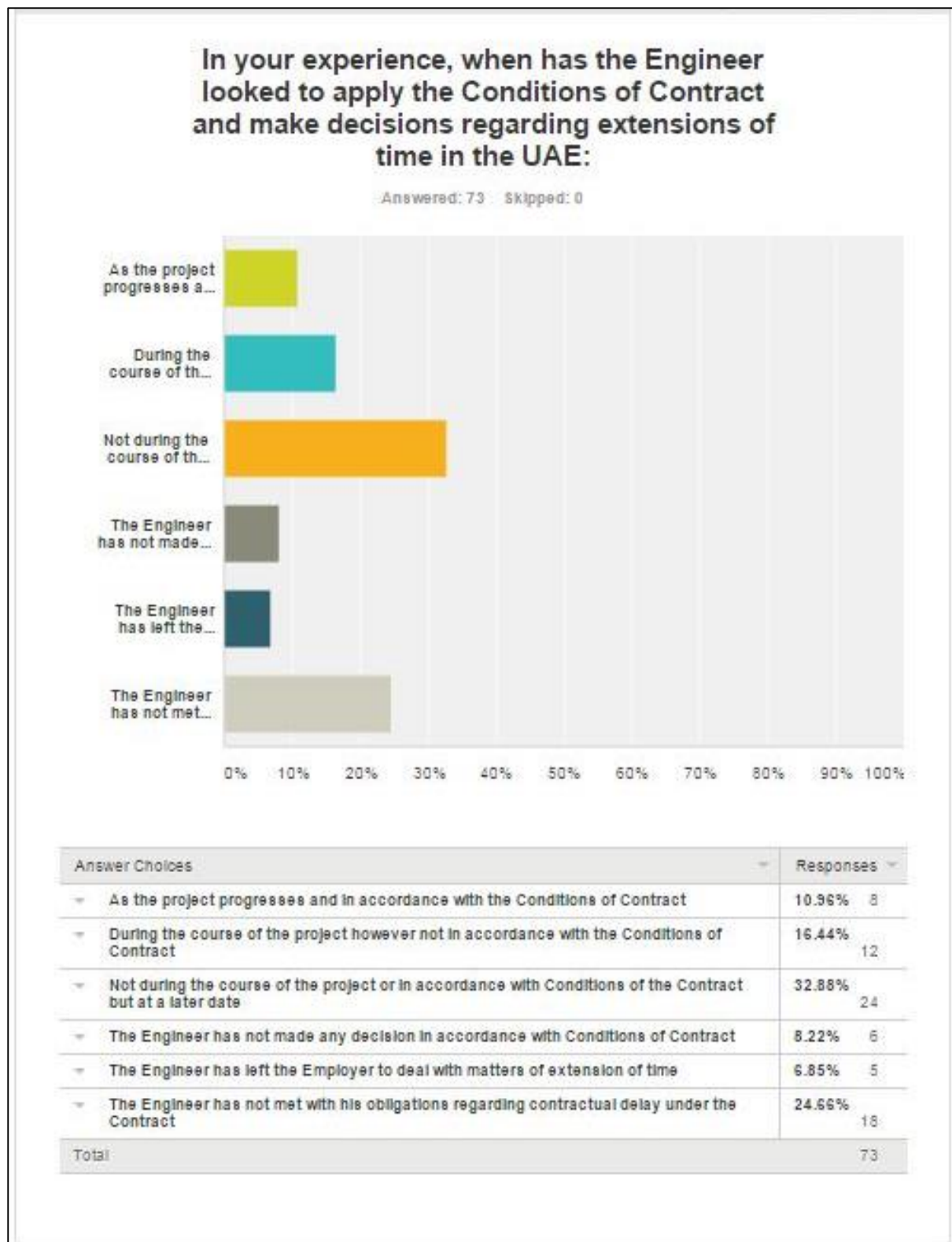
In my experience I have found that the Engineer's in the UAE possess a limited knowledge of contract and little to no knowledge or understanding of UAE law.

The survey illustrated that on average 58.9% of respondents considered the Engineer's knowledge and understanding of the Conditions of Contract to be average with 30.14% consider it to be poor. A mere eight (8) respondents out of the seventy two (72) researched considered the Engineer's knowledge of the conditions of contract to be good 10.96%.

My experience with Arabtec shows that the majority of projects currently engaged with are in delay and at some stage of dispute. What is commonly found and subsequently supported by this research is that the Engineer's poor knowledge and understanding of what are predominantly FIDIC contracts continually results in the parties entering into dispute.

Overall research shows that 89.04% of the claims consultants, lawyers and contractors consider the Engineer to have poor to average knowledge of contract.

3.2.12 - Question-12



Question twelve was set to investigate when the Engineer (if at all) has looked to administer the Contract for extending the contractual Time for Completion.

10.96% (8) recipients responded that the Engineer had made decisions at the appropriate time and in accordance with the conditions of contract.

Where I have found this to be the case, the Engineer has met with his obligations in this regard by simply rebutting the Contractors claims. The Engineer often looks to meet with his contractual obligations whilst ensuring that a positive move to increase the Time for Completion is disregarded. In doing so this often leads to dispute.

16.44% (12) of the recipients acknowledged that the Engineer would grant extension of time to the Time for Completion, however this is not done in accordance with the Conditions of Contract.

My experience here confirms that the Engineer often issues a retrospective extension of time that does not encompass the total amount of Employers delay and in doing so continually leaves the Contractor to the exposure of liquidated damages for late completion of the works.

32.88% (24) of the recipients responded by stating that the Engineer did not issue any extension of time during the course of the project or in accordance with the conditions of contract, but did so retrospectively.

My experience concurs that this is generally the case and is often done so through threat of having requested an Engineers decision under the contract and subsequently having served notice to commence arbitration. At this juncture the Contractor is in a position of whilst having completed the project he is subject to the exposure of liquidated damages and no recovery of prolongation costs.

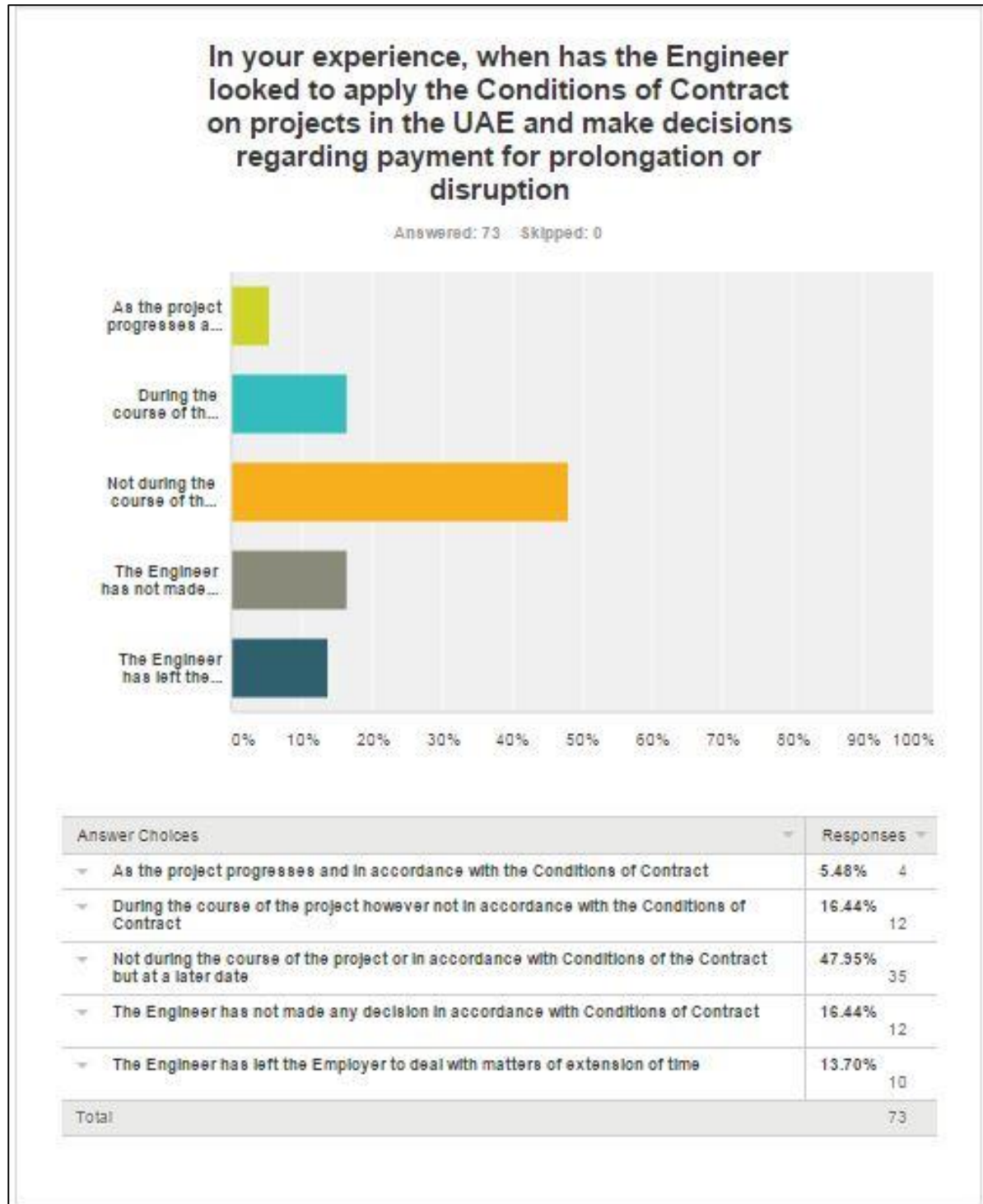
8.22% (6) respondents confirmed that the Engineer did not make any decision under the contract. This unfortunately is a position accepted by FIDIC under Sub-Clause 67.1 of the 1987 FIDIC Red Book and due to bad drafting a further issue under Sub-Clause 3.5 of the 1999 FIDIC Red Book. The Engineer's decision not to respond serves only to escalate the dispute to amicable settlement and (if that fails) arbitration. This decision is confirmed by the respondents as 6.85% (5) of them stated that the Engineer had left the decisions for extension of time with the Employer.

24.66% of the respondents considered that the Engineer had at no time administered the conditions of contract.

In summary of this question the research illustrated that 89.04 of participants considered that either during the project or after, the Engineer had not met with his obligations in

administering the conditions of contract. With this being the case the only obvious outcome is dispute.

3.2.13 - Question-13



Question thirteen was set with regards to the Engineer making any decisions regarding the award of costs for prolongation or disruption. The importance of this question was to ascertain any impact on the contractor's cash flow.

Only 5.48% (4) of the respondents considered that the Engineer had administered decisions regarding payment for prolongation or disruption, albeit the question did not acknowledge if any payment was actually made.

In my experience working in the UAE Arabtec have never received an Engineer's favorable decision on payment that was done so in accordance with the project

16.44% (12) respondents considered that the Engineer at some point in the project had made a decision but that this was not done so as the project progressed and in accordance with the conditions of contract.

My experience here would be to concur that the Engineer has not made any decision regarding payment for prolongation or disruption during the course of a project in the UAE.

47.95% (35) of the respondents confirmed that the Engineer had made payment for prolongation and disruption after the project had completed.

In my experience this has generally been the case with Engineers and Employers making some form of payment but never that as applied for by the contractor. The common case here is that the Employer and Engineer will (having secured the building of the project) look to apply liquidated damages on the contractor almost as a "bargaining tool" for some form of amicable settlement.

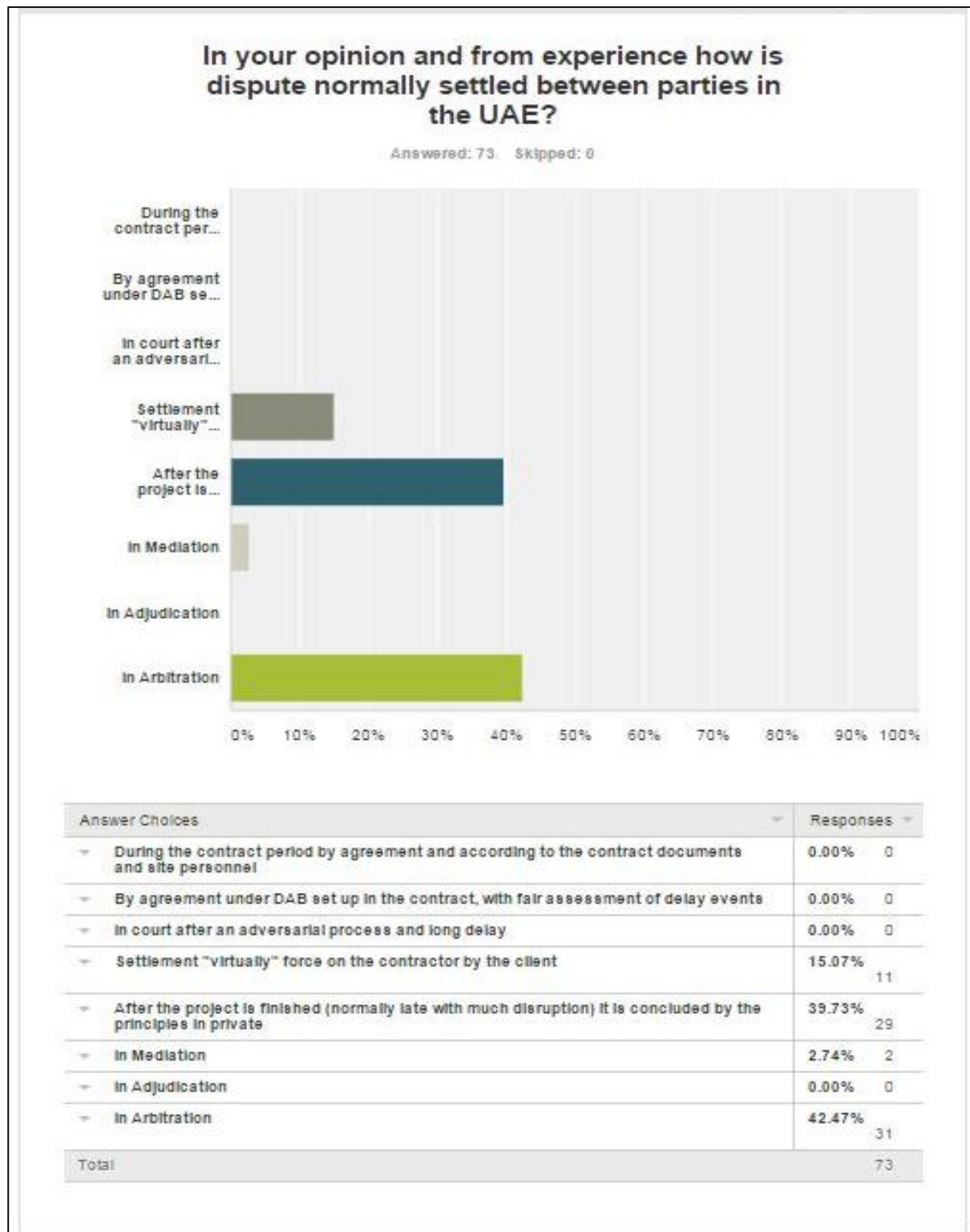
Whereas in previous years of the UAE "boom" period this appeared to be an accepted process by the contractor's, in recent years with fewer projects and tighter margins the contractor has not been able to accept this un-contractual process.

16.44% (12) of participants confirmed that the Engineer had never made a decision regarding payment of prolongation or disruption, whilst 13.70% (10) of the participants confirmed that the Engineer had left the decisions of payment for prolongation and disruption with the Employer.

In my experience 100% of decisions made regarding payment for prolongation and disruption on projects in the UAE are made by the Employer. In every instance under the

particular conditions of contract the Engineer is unable to make such a decision without prior approval from the Employer.

3.2.14 - Question-14



Question fourteen was set to find out as to how disputes are actually settled between the parties on projects in the UAE.

Analysis of this researched question illustrates that there are only three outcomes experienced by the respondents:

1. 39.73% (29) of the participants had experienced disputes being finalized by the parties through discussion after the project had been completed.
2. 2.74% (2) respondents had actually noted experience of Mediation to be used in the settlement of disputes in the UAE.
3. 42.47 (31) respondents noted arbitration as being the form of dispute resolution between the parties.

What the research clearly indicated was that: at no time did the parties resolve any disputes during the course of the project and that there was any experience as to either party resolving dispute through either a Dispute Adjudication Board (DAB) or Adjudication or by litigation through the courts.

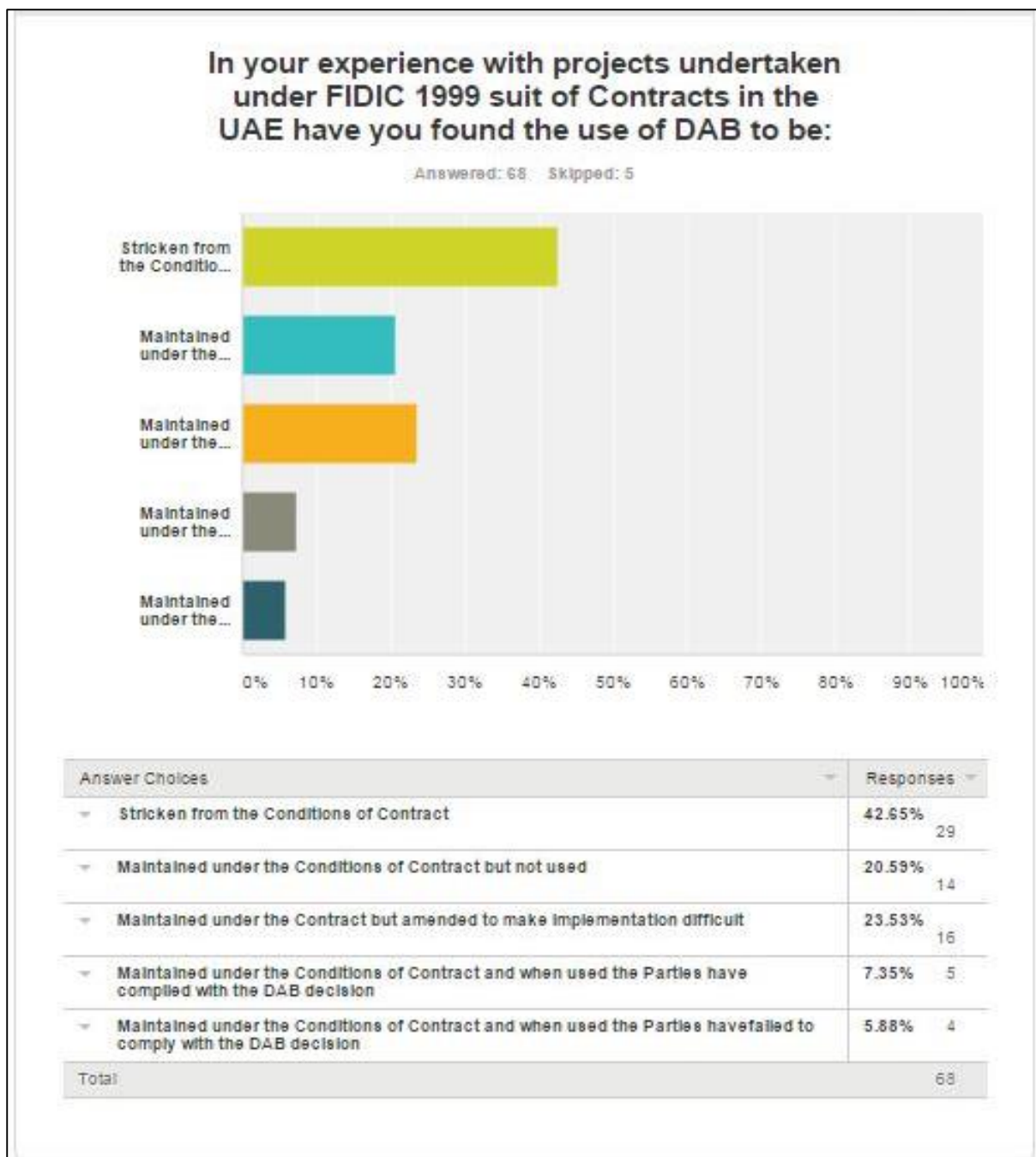
In my experience I would concur with the results of this research noting that:

1. As the majority of Employers on projects are Emiratis it is cultural for disputes to be agreed by Majallis. As major projects are usually linked to the UAE government we at Arabtec have found that it is usual to meet with the Sheiks in arriving at a settlement of disputes.
2. I have not experienced any form of formal Mediation or Conciliation in overcoming disputes within the UAE.
3. Where agreement has not been made through amicable settlement in accordance with the aforementioned point one (1) disputes are formally settled via Arbitration. The reason for this is quite simply because this is the most commonly accepted form of dispute resolution presented under the contract. Most UAE contracts being in the

form of a FIDIC Red Book, arbitration is commonly called for with the “Agreement to Arbitrate” setting out the Seat, number of arbitrators, the rules of arbitration and the governing law.

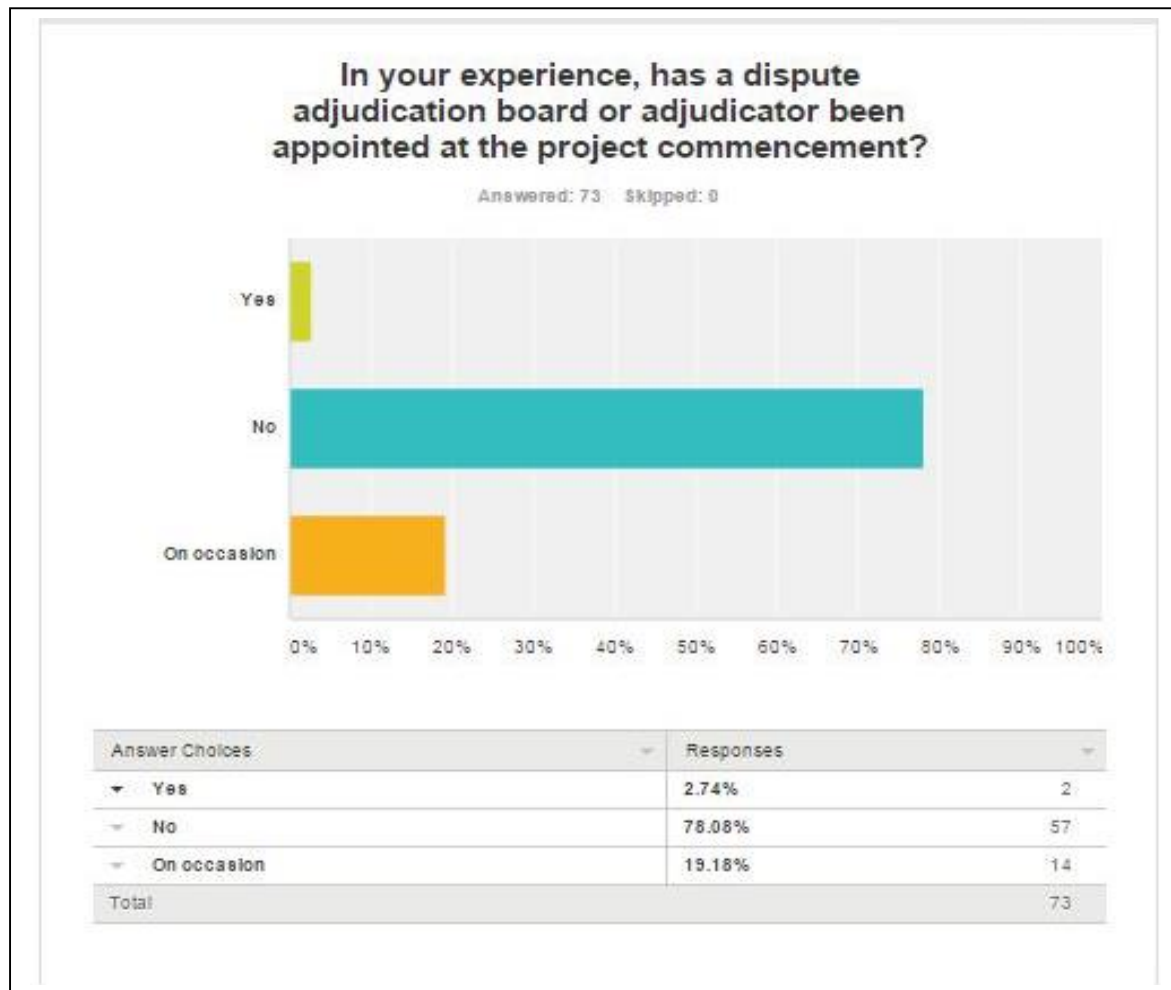
As the contract calls for arbitration, the parties having agreed to arbitrate cannot proceed through the courts without being subject to jurisdictional challenge.

3.2.15 - Question-15



Following on from question fourteen where it was established through research that a Dispute Adjudication Board had not been the source of dispute resolution to a dispute, question fifteen was set to establish the approach to a DAB under the contract.

There was a conflict found here when analyzing these results as whereas previously the respondents reported that no dispute had been resolved by the use of a DAB, here 7.35% (5) of the respondents confirmed that they had now experienced the use of a DAB and that the parties had complied with the DAB decision. My research did not extend further to establish as to the parties that have agreed to a decision through the use of a DAB but would consider that as the Abu Dhabi government now utilize the 1999 First Edition FIDIC Red and Yellow books where under these contracts the DB is maintained, then it would be a reasonable assumption that in these cases the Abu Dhabi government would look to comply with a DAB decision. This would be subject to further research.



3.2.16 - Question-16

Question sixteen was set to establish if a Dispute adjudication Board or sole adjudicator had been appointed at the commencement of a project.

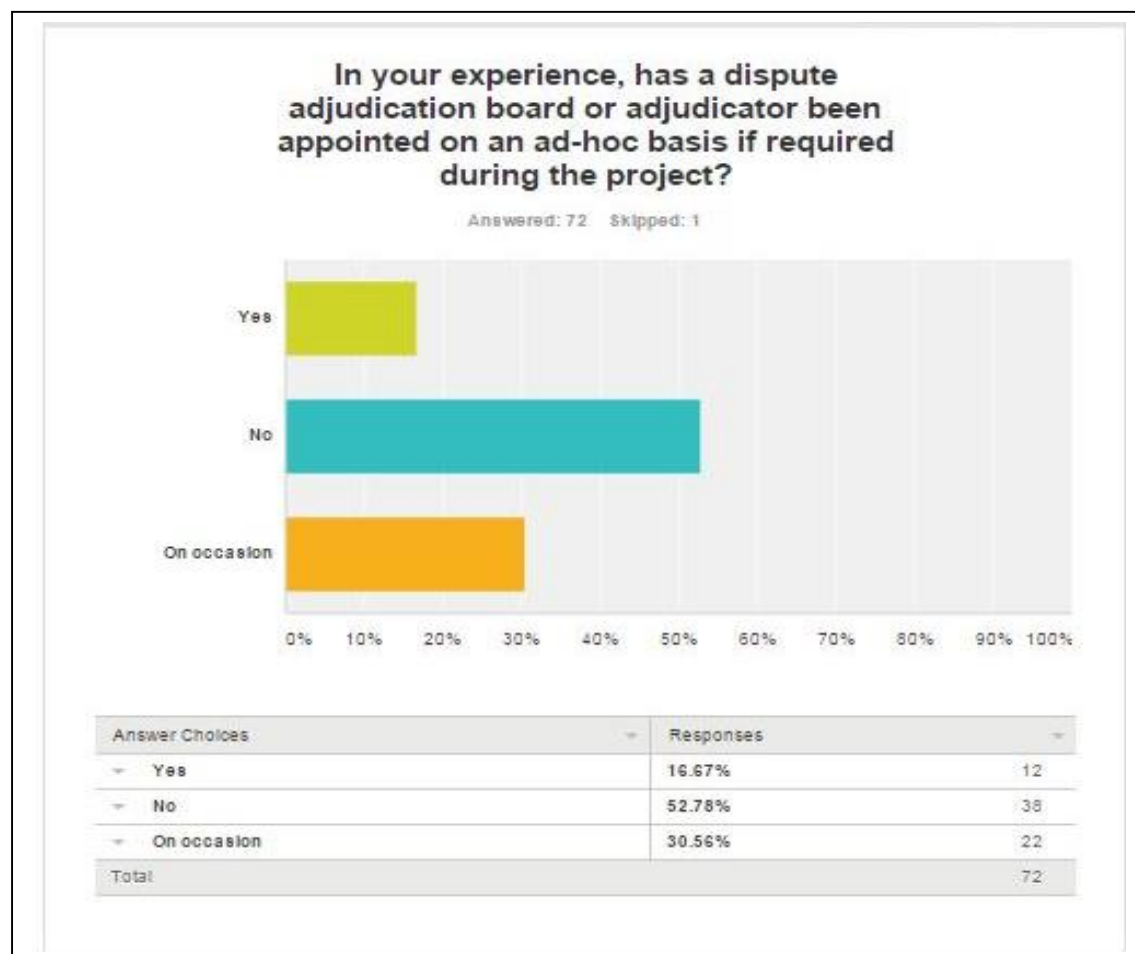
In hindsight this question should have been set as a direct yes or no answer and as such I have taken the answer as that of “on occasion” to mean yes.

As such 21.92% or (16) respondents have experienced that on the occasion where 20.59% the DAB has been maintained under the contract, a DAB or single adjudicator has been appointed.

This question would require further analysis as where research has displayed that only 7.35% of DAB decisions have been complied with I would not see as to why the parties would look

to incur the costs of a DAB or sole adjudicator if they were not to comply with their decisions.

In my experience a DAB or sole adjudicator has never been appointed whether before or after a contract has been entered into maintaining the DAB conditions.



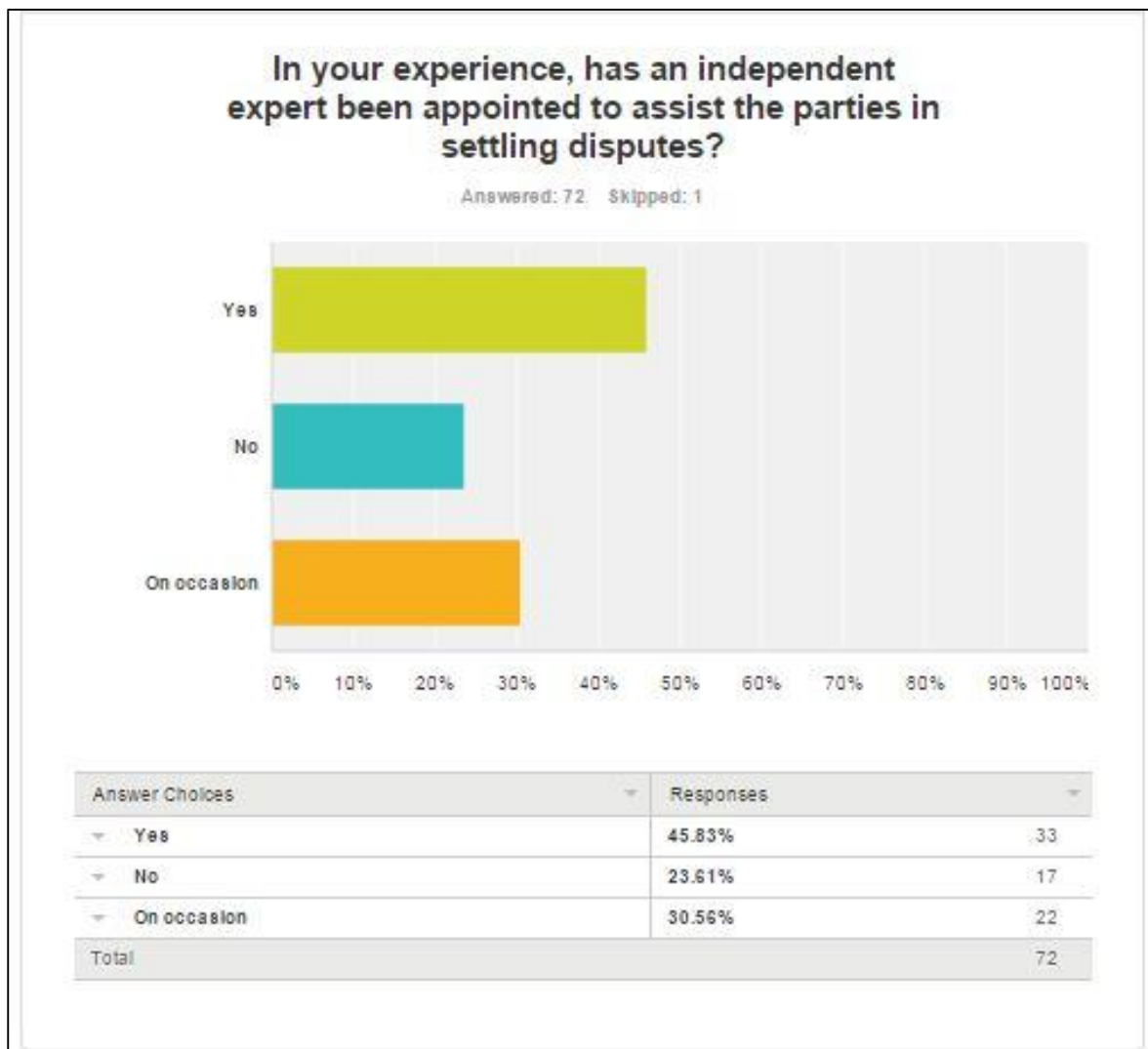
3.2.17 - Question-17

Question seventeen was set as a follow up to questions fifteen and sixteen where upon research provided a response that 78.08% (57) of the respondents confirmed that adjudicators had not been appointed at the beginning of the contract.

52.78% of the respondents confirmed that in their experience an “Ad Hoc” adjudicator similarly had not been appointed.

In hindsight this question should have been set as a simple yes or no answer.

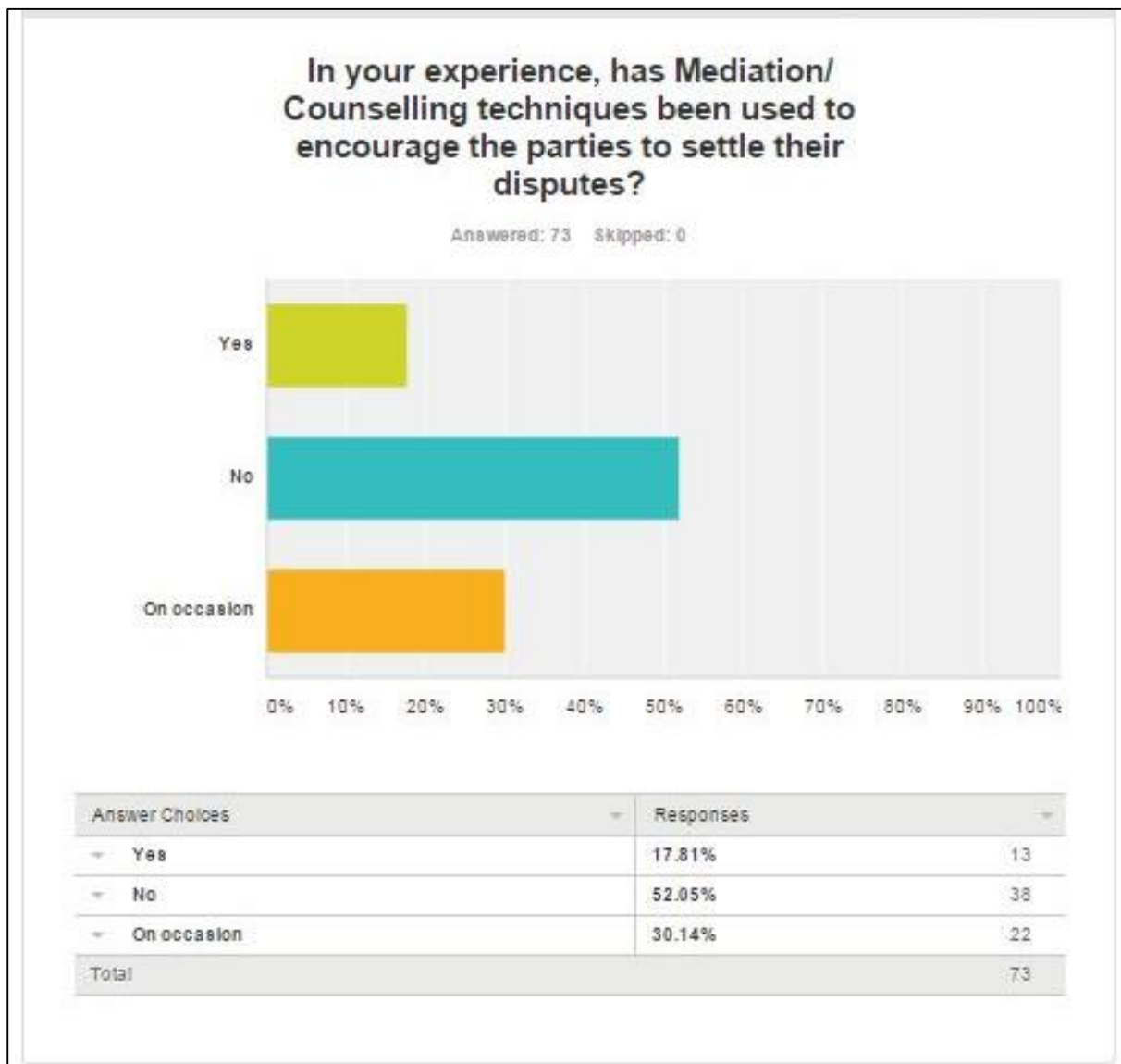
47.22% of respondents confirmed that an adjudicator had been appointed on an “Ad Hoc” basis.

3.2.18 - Question-18

Question eighteen was set to research as to how often independent experts are utilized in order to assist the parties in settling disputes.

Again the question here would probably have been best suited to a simple yes or no answer. As such the position of “On Occasion” will be treated as a yes. This being the case 76.39% confirmed that independent experts were used in resolving disputes.

My experience here is that as more disputes involve arbitration, the need for independent expert witnesses has increased. At present Arabtec have involved independent experts on most of its claims and disputes.

3.2.19 - Question-19

Question 19 conflicts with the results received from question fourteen where only 2.74% of disputes were stated as being decided in mediation.

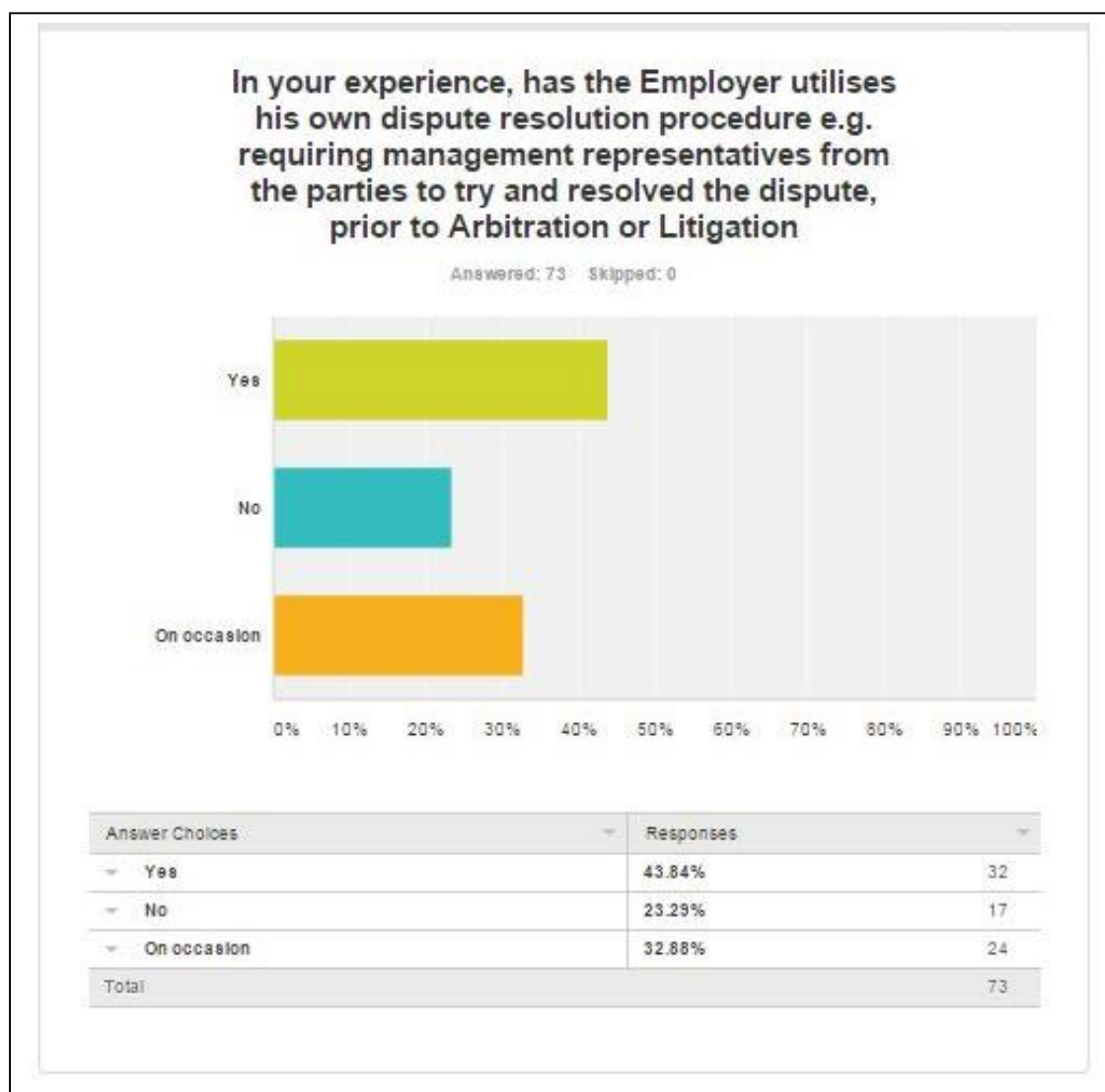
Again this question would have possibly required a simple yes or no answer and as such the answer as “on occasion” has been taken as a yes.

47.95% of respondents considered that Mediation counselling techniques had been used to encourage the parties to settle their disputes.

In my experience, formal Mediation has never been applied to any dispute engaged by Arabtec. What has been encountered as highlighted in the responses to question fourteen was that 15.07% of disputes had been forcibly settled by the Employer whilst 39.73% of disputes had been agreed between the Contractor and the Employer following project completion and without formal Mediation.

I would consider that in all instances the parties would have been encouraged to mediate.

3.2.20 - Question-20



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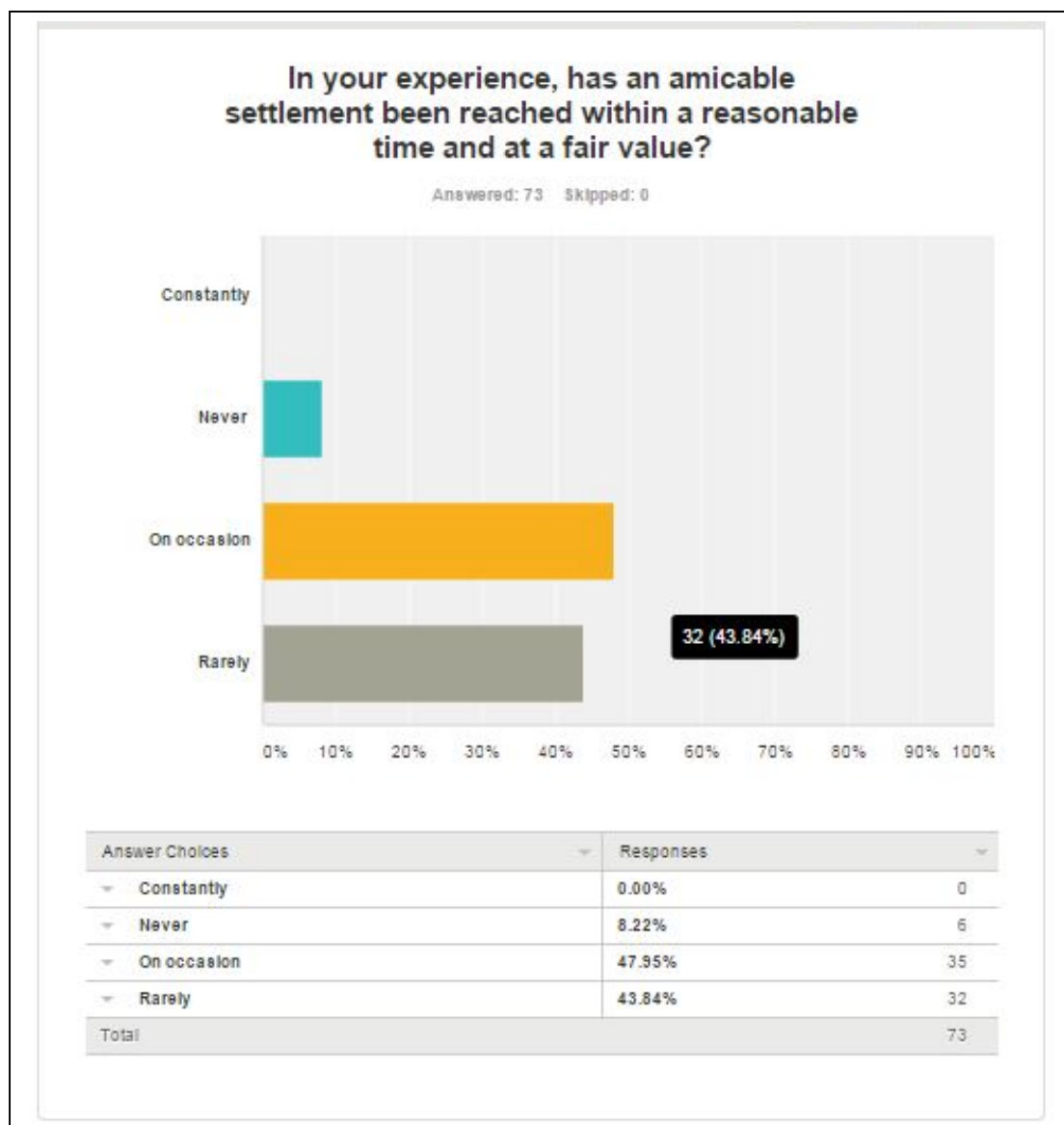
As the research has illustrated, the Employer and Engineer in the main do not engage with the mechanics of the contract when considering the Contractors entitlements to time and cost for delay. (see question...)

Question fourteen clearly established that 39.73% of respondents experienced that Employers sought to agree to disputes following project completion.

The responses to this question twenty illustrates that 76.71% of Employers sought to seek amicable settlement to disputes through their own means and by the use of engaging members of the parties management.

Again this process does not apply the use of any formal mediation but merely utilizes the Employers own staff to try and resolve the dispute(s).

3.2.21 - Question-21



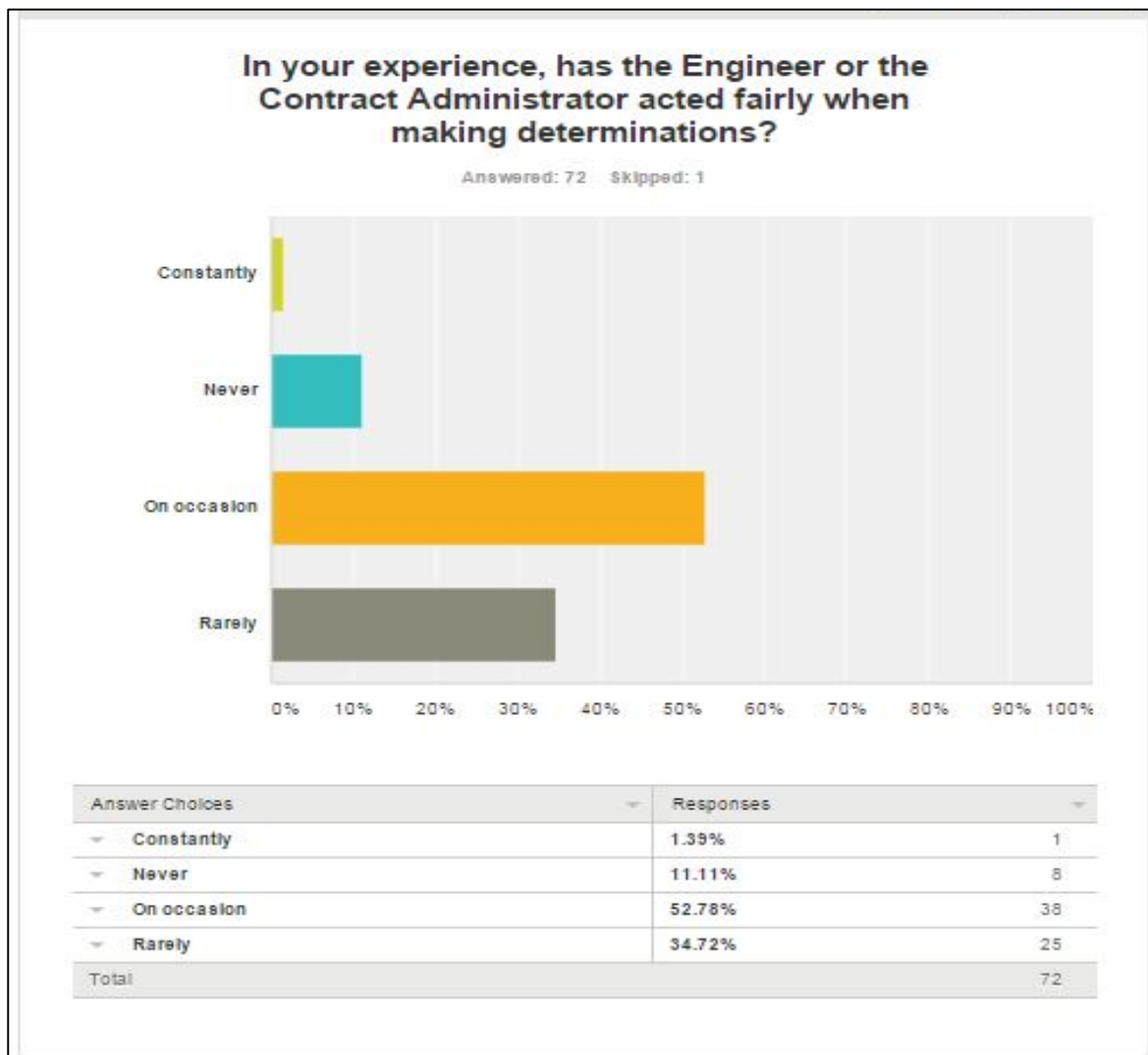
Following question twenty, question 21 was set to research

the response to achieving an amicable settlement.

47.95% of respondents had experienced occasions of amicable settlement. This closely correlated with the results in question fourteen where 52.06 % of Employers had achieved an agreement without entering into arbitration.

The analysis of this question did however illustrate that with 8.22 % of respondents noting that never had amicable settlement been achieved and 43.84 % stating that it was rarely achieved, this supported the only course of action under a FIDIC contract that 52.10 % of delays would be arbitrated upon.

3.2.22 - Question-22

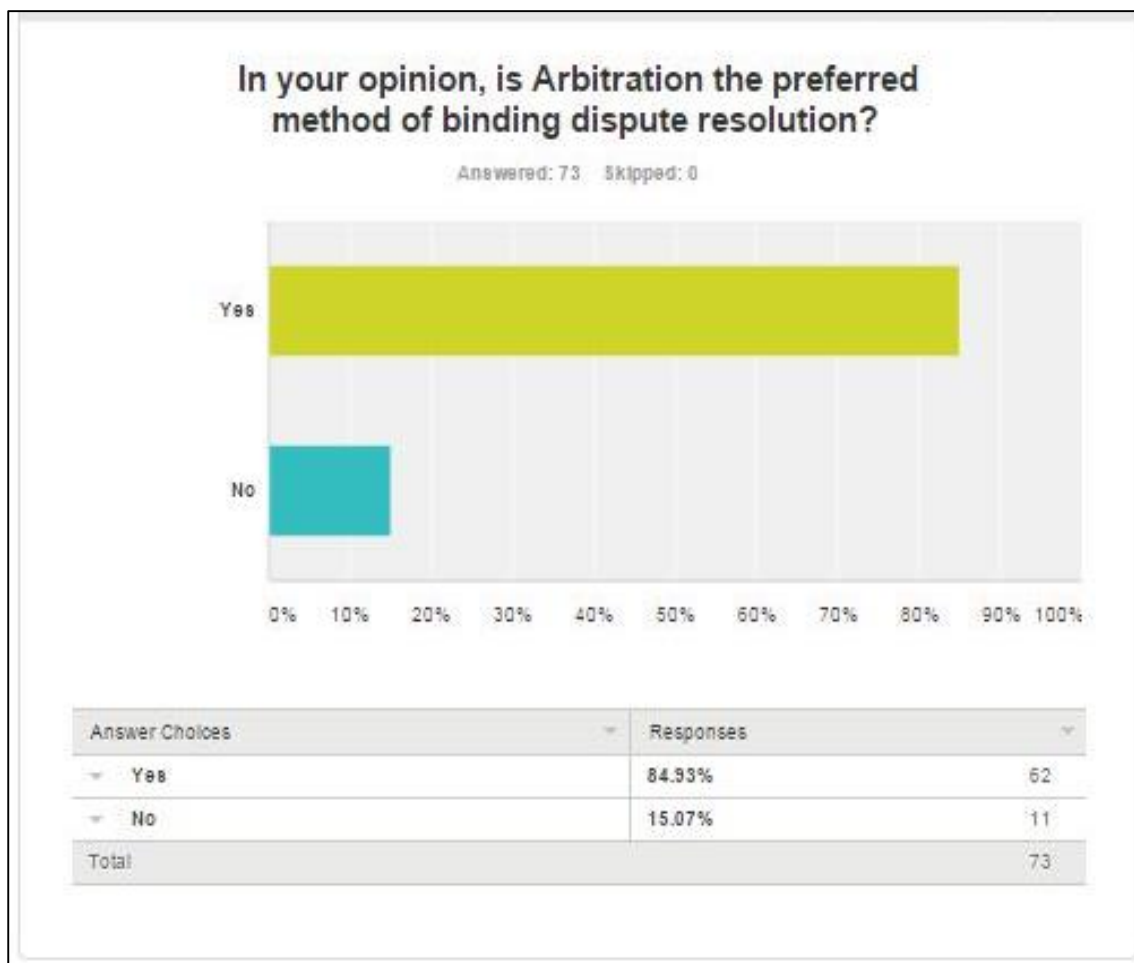


Question twenty two proffered the direct question as to the Engineer's fairness when making decisions.

It is alarming to note that only 1.39% (1) respondent noted that the Engineer had acted fairly when issuing determinations. This unfortunately is a position that through my experiences with Arabtec I would concur with.

As the other 71 respondents distributed the remaining 98.61 % of their experience as being either never, on occasion or rarely, not only does this support the previous questions regarding the administration of the contract by the Engineer where research has illustrated that the Engineer does not administer the contract during the course of the project, the outcome of which can only result in dispute.

3.2.23 - Question-23



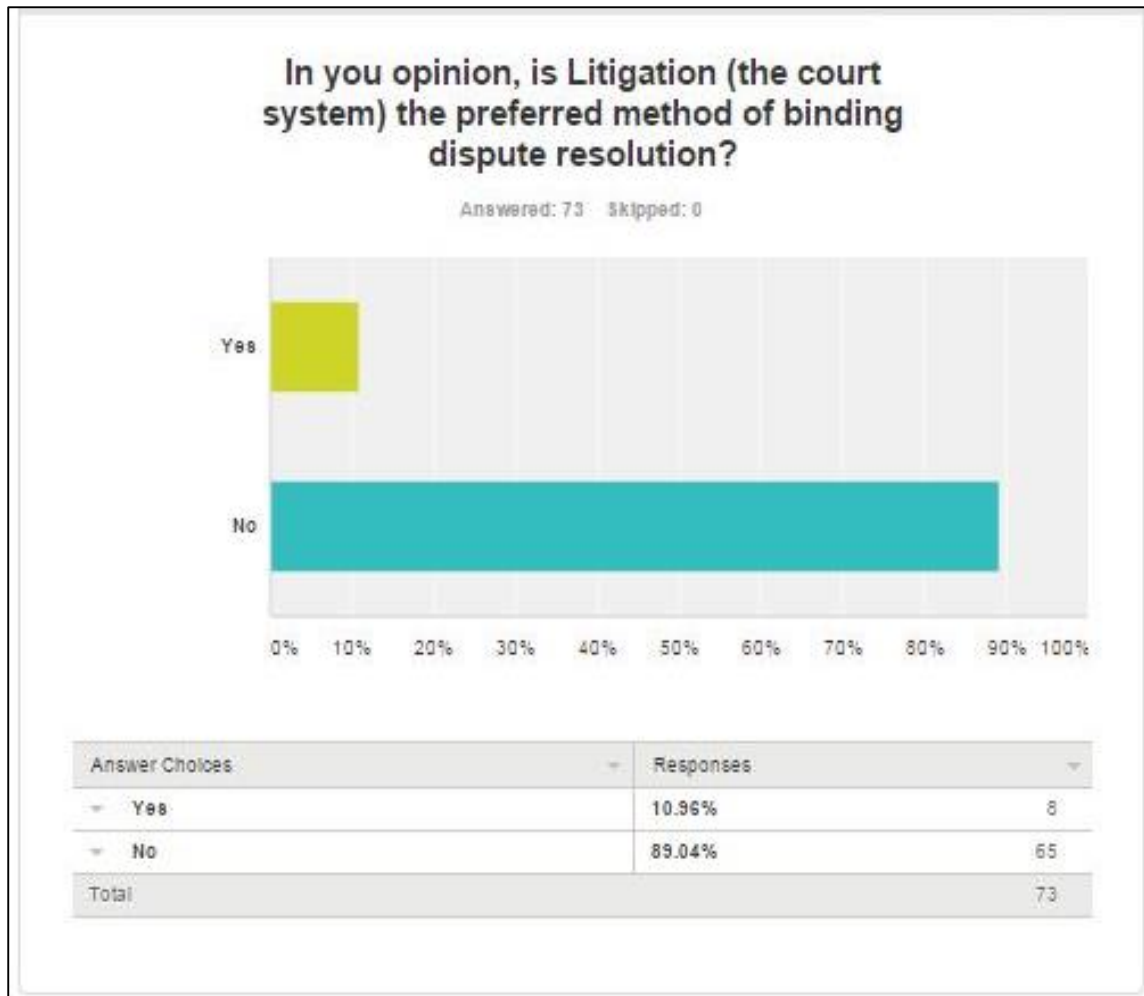
Question twenty three presented a direct yes and no option to arbitration being the preferred method of binding dispute resolution. A resounding 84.93 % of respondents stated that it was.

I have experienced that there are several reasons behind this being the case:

1. For commercial disputes arbitration is confidential in its findings,
2. An arbitral award is binding once ratified by the courts
3. For commercial disputes that are often technical, the arbitrators and expert witnesses are more qualified than the court system in understanding the dispute.

The responses were in this instance interesting on the grounds that the question was related to personal opinion and NOT experience and as such answered the question that the majority preferred with the standard form of alternate dispute resolution which was to take disputes to arbitration.

3.2.24 - Question-24



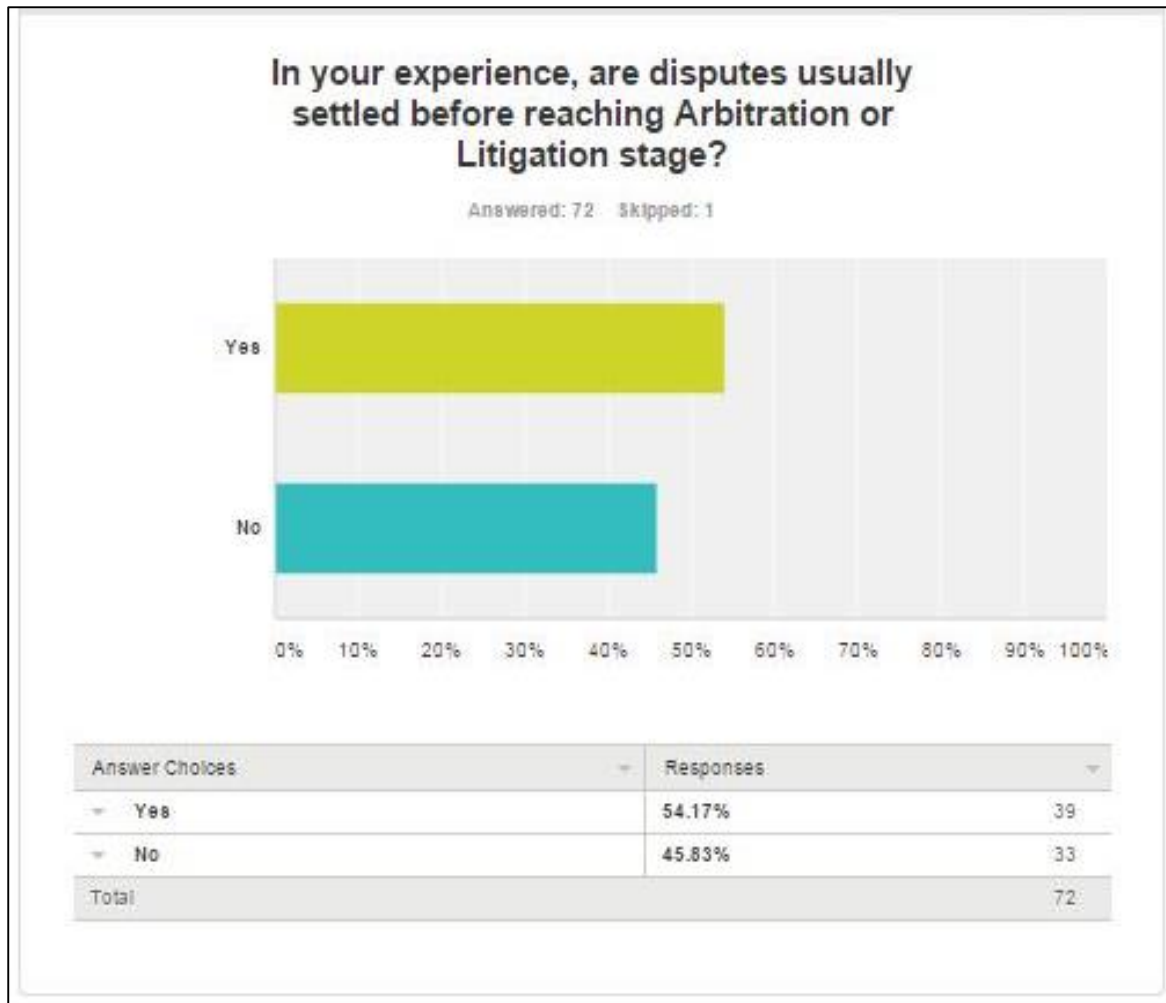
The response to question twenty four categorically proved that litigation was not the preferred option for dispute resolution on projects in the UAE.

As stated previously, commercial disputes are often favored to be resolved under arbitration due to the confidentiality maintained under the process.

It was often considered that litigation provided for a long term and costly method of resolving disputes, however arbitrations such as the Pesero case have illustrated that arbitration can be a long and costly process.

Due to the standard forms of FIDIC contracts reference to arbitration the common contractual outcome of a dispute tends to follow in it being in arbitration.

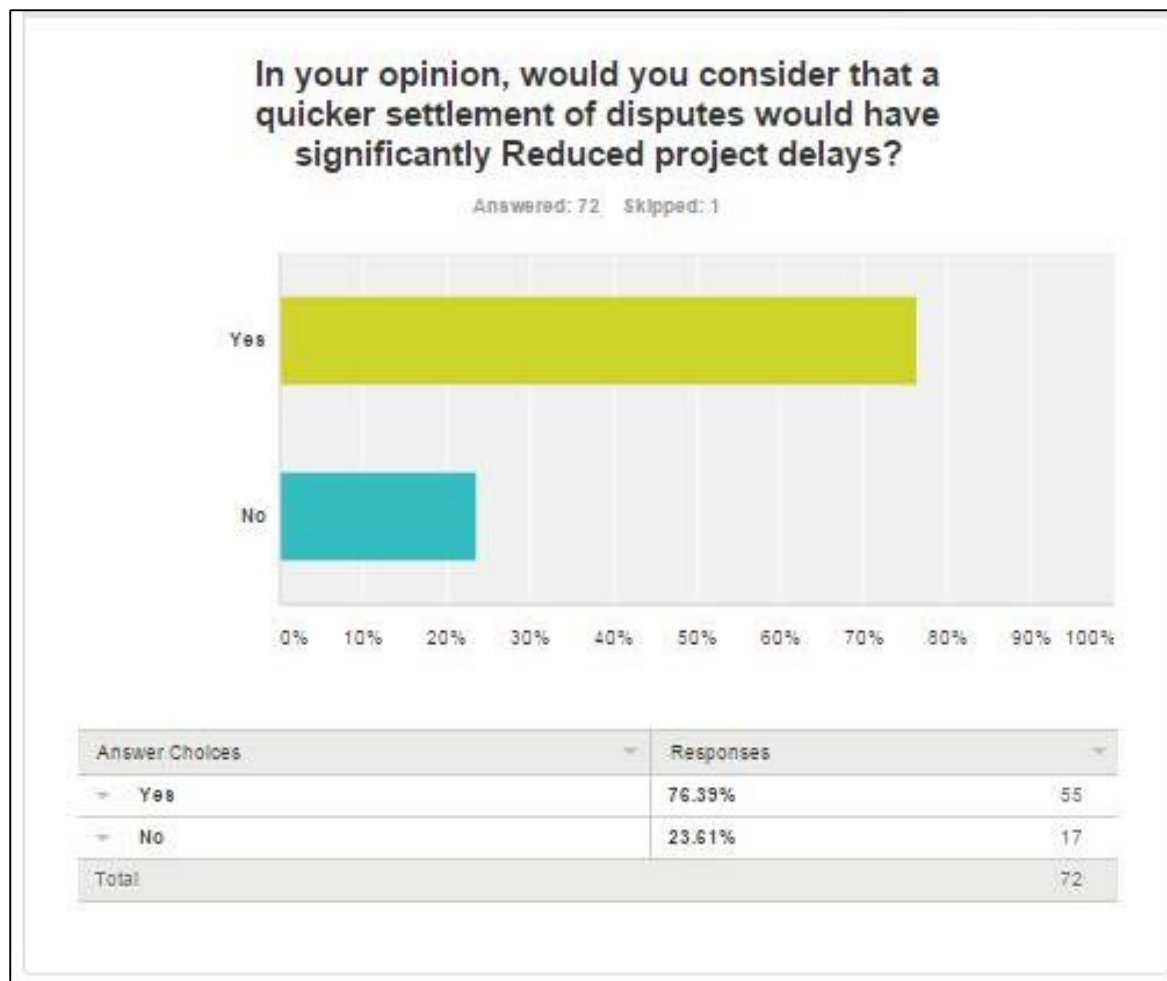
3.2.25 - Question-25



Respondents to question twenty five confirmed that 54.17 % of disputes were settled before reaching arbitration or litigation. This aligns with research under question fourteen where 54.86 % of respondents confirmed that disputes were settled after the project was completed either amicably or forced upon the contractor by the Employer.

45.83 % of respondents stated that amicable settlement was not obtained. This aligns with the response under question fourteen where 42.47 % of respondents stated that arbitration was the common form of dispute resolution.

3.2.26 - Question-26



Question twenty six was set to establish if in the absence of any speedy settlement to disputes, was there an impact to the project.

76.39 % of respondents confirmed that quicker settlement of disputes would have reduced delays.

In my experience and that supported through research to questions set under question .. it is shown that late design or changes to design are the major causes of delay.

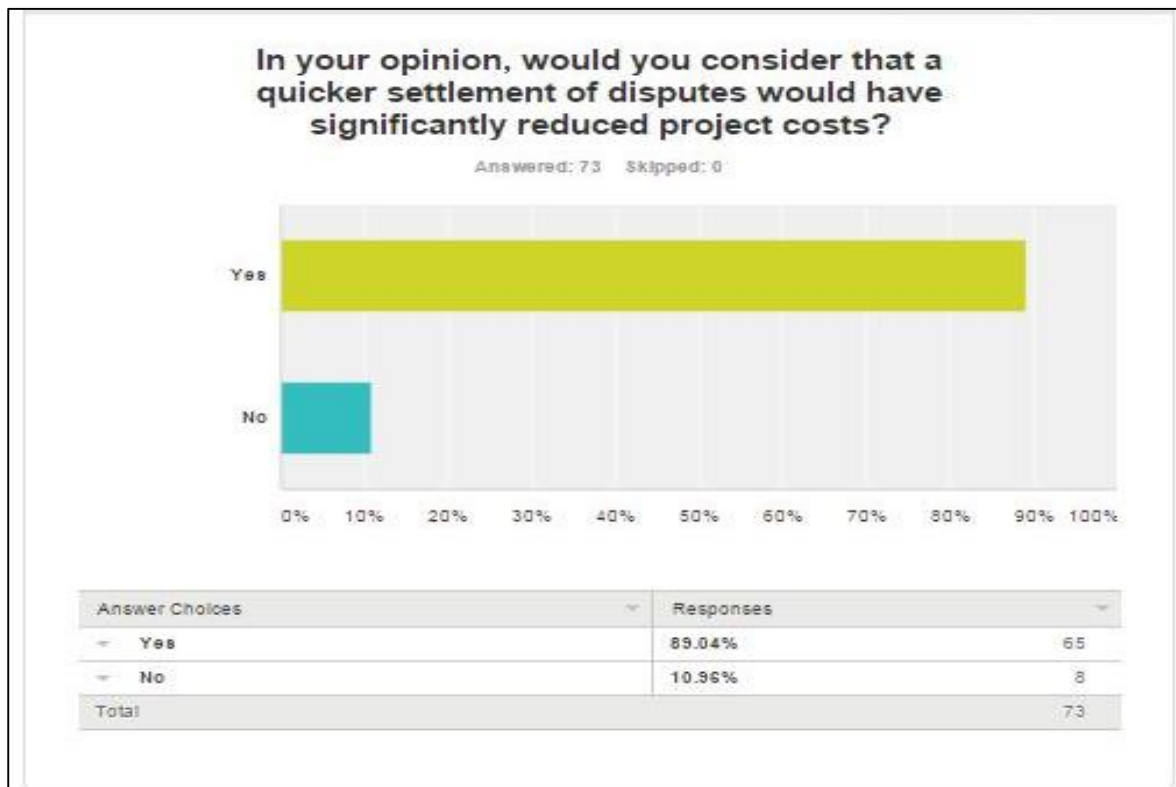
It has also been established by this research that the Engineer does not (in most cases) look to administer the conditions of contract through the course of the project when considering extension of time and prolongation costs.

The failure by the Engineer to administer the contract leads to:

1. the contractor having no logical program to work to,
2. the contractors cash flow being stifled,

3. animosity between the parties,
4. disruption between the contractor and subcontractor's and
5. Dispute.

3.2.27 - Question-27

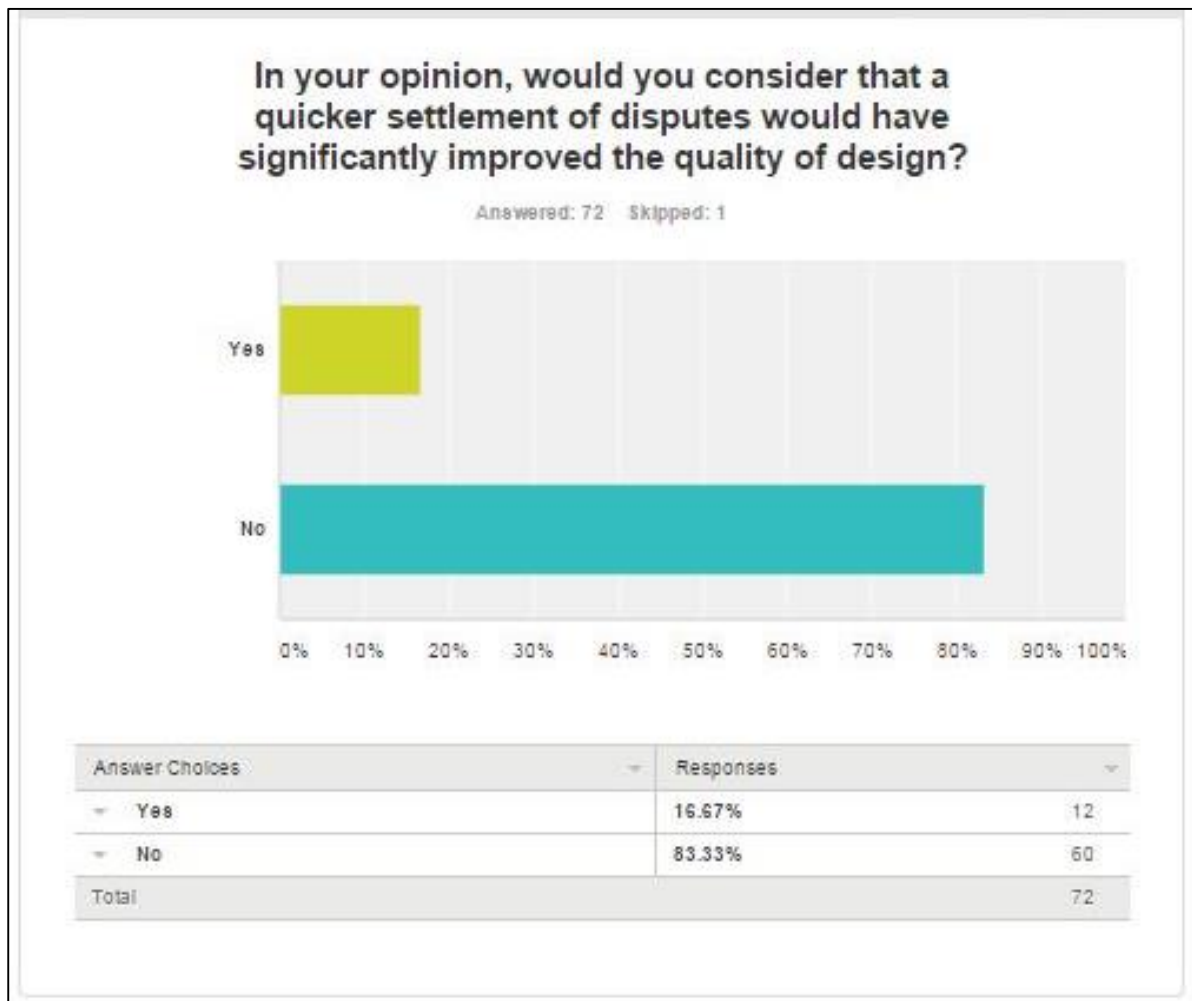


Question twenty seven posed the question as to the prompt settlement of disputes resulting in reduction to project costs.

89.04 % (65) respondents stated that quicker settlement of disputes would have resulted in a reduction to project costs.

My experience with Arabtec would concur with this analysis as delay in project completion and the subsequent impact of Employers slowing down payments in alignment with progress has major impact on the contractors running costs and his ability to pay subcontractors.

The other factor here to consider is the actual cost of taking a dispute to arbitration, then in instances on projects in the UAE and experienced by Arabtec can run into tens of millions of dirhams.

3.2.28 - Question-28

Question twenty eight was set to investigate the impact of early settlement of disputes upon design.

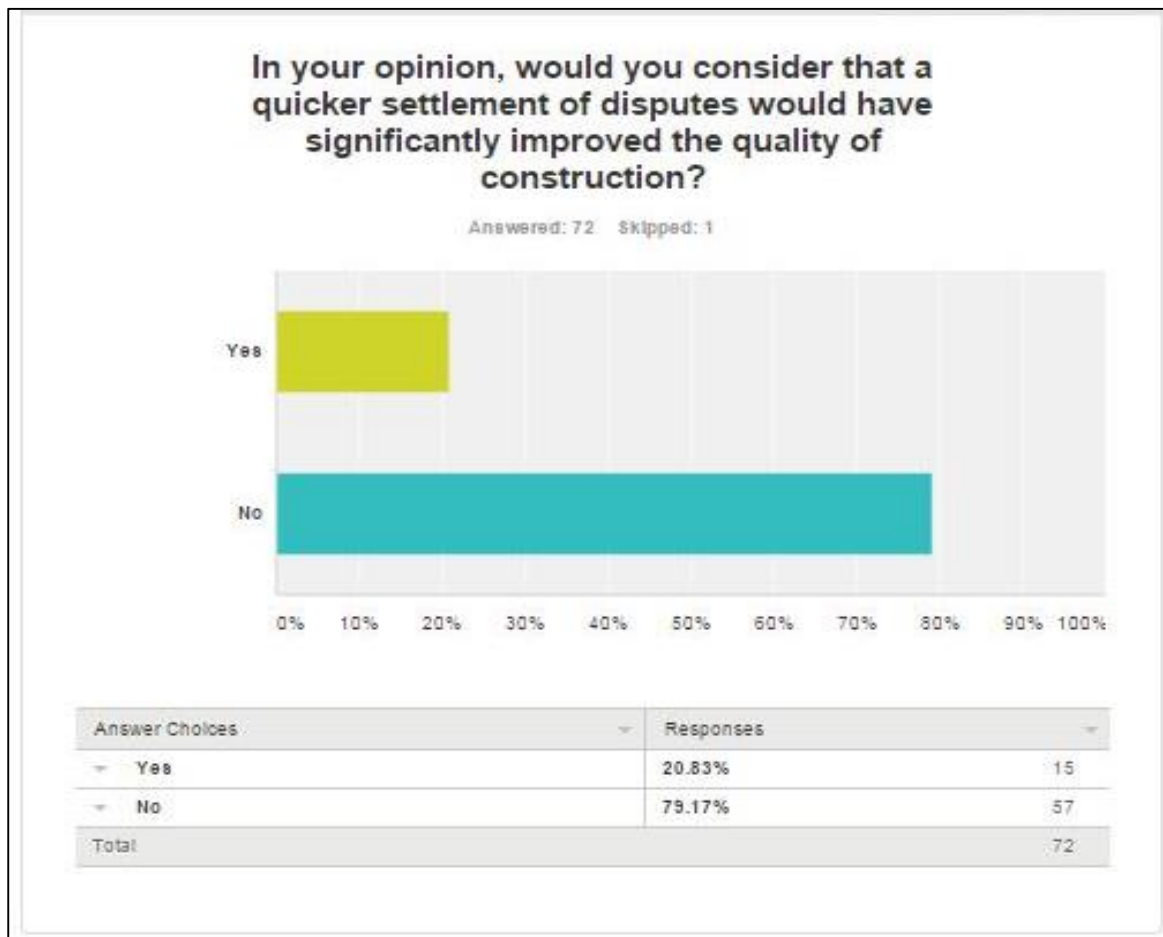
83.33 % of respondents stated that early settlement has no effect on the quality of design.

Subsequent research has displayed that changes in design or incomplete design are the major contributing factors to delay. This is often the outcome of constructing unique buildings in the region. The main issue here is that the indecisiveness of the Clients and the restrictions on the Engineer's abilities to transfer concepts into full design present their own problems.

Furthermore the design of a project and the works carried out are strictly controlled in the UAE and as such the quality of workmanship and construction should be of a reasonable standard.

The factors affecting extension of time and subsequent costs would not (as the survey illustrates) have an effect on the quality of the design.

3.2.29 - Question-29

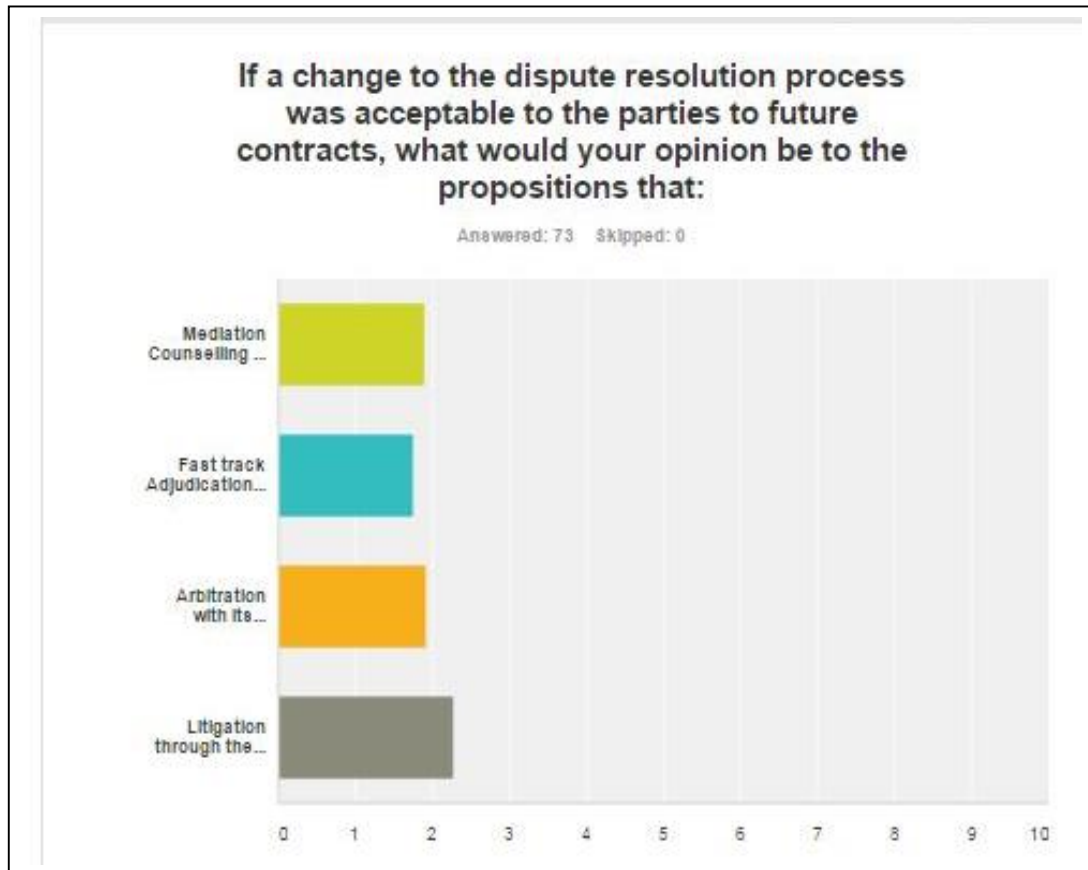


Question twenty nine was set to assess the impact that quicker settlements to disputes would have on the quality of construction.

79.17 % of respondents confirmed that quicker settlement of disputes would have no impact on the quality of construction.

The important factors disclosed under research of questions twenty eight and twenty nine is that no matter the delay caused to the project, there is only 16.67% of respondents experiencing any impact on the quality of design with 20.83 % reporting an impact on the quality of construction.

In my experience with Arabtec I would confirm that due to the quality procedures in place on the projects involving all the appropriate checking and inspections undertaking to sign off on the works, the quality of design and construction would not be affected by a speedier resolution to disputes.

3.2.30**-
Questi
on-30**

	Yes	No	It depends	Total	Weighted Average
Mediation Counselling by an independent 3rd party, at a low cost shared between the parties on a 50/50 basis, relying on mutual trust and cooperation, would be an effective method of dispute resolution	45.07% 32	19.72% 14	35.21% 25	71	1.90
Fast track Adjudication or Adjudication Boards, with industry experts giving independent and impartial contractually binding determinations, within a timescale of 1-3 months at reasonable cost shared 50/50 between the parties, would be an effective method of dispute resolution	56.34% 40	11.27% 8	32.39% 23	71	1.76
Arbitration with its independent, impartial and finally binding nature, often using industry experts, whilst taking many months or years to reach a resolution is the most appropriate method to settle disputes particularly as cost may be awarded in favour of the winner i.e. losing party to pay costs of arbitration	48.61% 35	9.72% 7	41.67% 30	72	1.93
Litigation through the courts is the best solution for settling disputes due to its final and binding nature; particularly as costs may be awarded in favour of the winner i.e. losing party to pay the litigation; though it may take more than one year to reach a determination, especially if appeals permitted	2.82% 2	66.20% 47	30.99% 22	71	2.28

Question thirty was presented to the respondents in order to assess their opinions on the matter of alternative dispute resolution.

The analysis of the research undertaken displayed that in the opinion of the claims consultants, independent experts, lawyers and contractors the following options were given in order of precedence:

1. Fast track Adjudication or Adjudication Boards with industry experts,
 2. Arbitration with its independent, impartial and binding nature,
 3. Mediation counselling by an independent third party, and
 4. Litigation through the courts.
-
1. When considering the preferred options of the industry experts it is notable that the preferred option of adjudication or a Dispute Adjudication Board is on the whole rejected by Employer's and the UAE courts. The problems presented by FIDIC in the drafting of the DAB clauses under Clause 20 of the FIDIC 1999 First Edition Red Book also encourage the parties from utilizing this form of dispute resolution.
 2. Arbitration lends itself highly with regards to the impartiality and confidentiality of the dispute process.
 3. Mediation was surprisingly the lesser option and yet presents itself as the most cost effective and quickest way to resolve disputes.
 4. Litigation through the courts has throughout this research proven to be the option most respondents considered to be followed and preferred.

CHAPTER FOUR : CONCLUSION

The fundamental aim of this research was to evaluate the most common causes of contractual delay and research the contractual outcomes of these delays.

The research has confirmed that:

1. Whilst there are a wide range of contracts to be chosen from, Employer's and Engineer's in the UAE and Mena region continually revert to either the 1987 FIDIC Red Book or the 1999 First Edition FIDIC Red Book.
2. That either form of contract provide obligations on the parties to address matters of additional time and cost.
3. That the most common causes of delay are design changes (variations to contract) or the lack of design at tender stage.
4. That whatever the form of contract, the Engineer for the majority of time does not meet with his obligations under the contract in addressing the contractor's entitlements to time and cost.
5. That the Engineer is continuously prevented by the Employer in making decisions regarding time and cost.
6. The Engineer or the Employer constantly fail to act fairly when making any decision (if at all).
7. That the use of Dispute Adjudications Boards are generally struck from the contract and that when used the parties very rarely comply with the DAB decision.
8. That formal mediation (although preferred by the consultants and lawyers) is very rarely applied to resolving disputes.
9. That litigation has not been experienced for resolving construction disputes.
10. That Arbitration is the most common form of dispute resolution applied in the UAE.

This research has shown that the inevitable outcome to the settlement of claims ie arbitration is not due to the choice of contract or (as has been experienced by the respondents) a lack of understanding or knowledge of contract.

The results presented support the hypothesis that:

1. The conditions of contract are predominantly either the 1987 FIDIC Red Book, the 1999 First Edition FIDIC Red Book, or a bi-product of both,
2. the Employer's and their Engineer's constantly fail to comply with their obligations under the contract(s) with regards to the extension of time and cost claims, and

3. That incomplete design or changes to design are the most common factors of delay.

It is clear that formal mediation is not encouraged and does not play any significant role in resolving dispute and that the absence of any willingness to seek a speedy resolution through adjudication or a DAB only render a contractual outcome to be either arbitration or litigation.

As the Construction industry has declined in the UAE over recent years it is unfortunate to witness the rise in the number of consultancies and lawyers benefiting from the parties disputes.

So long as projects continue to follow the same contractual process, in the absence of statutory adjudication or a clear contractual direction to apply formal mediation in seeking amicable settlement is developed, the construction industry in the UAE shall continue to find itself expending considerable millions in UAE Dirhams ad US dollars in funding the expanding businesses of the claims consultants, independent witnesses and lawyers.

END OF THESIS

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