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Dispute Resolution Mechanism under The 2017 FIDIC Red Book

وسائل فض المنازعات في عقود فيديك 2017 – الكتاب الأحمر

by

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ABSTRACT

The disputes between the contracting parties in construction projects are unavoidable due to the nature and complexity of the construction contracts; therefore it is important to include a dispute resolution mechanism in the construction contracts, using one of the popular standard form of contracts such as FIDIC standard forms of contracts is recommended to reduce the level of disputes between the parties, these forms are continually developed to reflect the development in the construction industry, a new revision of The FIDIC Red Book was launched in 2017 which include a fundamental development in the Dispute Resolution Mechanism.

This study has discussed and analysed the efficiency of the developed dispute resolution mechanism in The 2017 FIDIC Red Book since this amendment aims to make the process of resolving the disputes in construction projects faster, cheaper, and more effective. In fact, the new forms are intended to avoid disputes between the parties by providing dispute avoidance roles to the dispute board.

Although the FIDIC Red Book is broadly used in the UAE, very few projects implement the FIDIC Red Book dispute resolution mechanism to resolve disputes. This study highlighted the reasons behind that and identified the improvement from the 1999 FIDIC Red Book and whether the updated mechanism in the 2017 Red Book will encourage professionals to adopt it in new construction projects.

The literature review was undertaken on the claims and dispute resolution mechanism under FIDIC standard forms of contracts followed by an online survey questionnaire distributed to construction professionals at different levels to collect a considerable amount of data to complete the required data analysis on the new FIDIC Red Book and its developed dispute resolution mechanism.

المخلص

النزاع بين الأطراف المتعاقدة في مشاريع البناء دائم الحدوث وذلك لطبيعة هذه العقود والتعقيدات المصاحبة لمشاريع البناء، لذلك يجب تضمين العقود آلية لحل هذه النزاعات عند حدوثها، يعتبر استخدام واحد من صيغ العقود النموذجية الجاهزة مثل عقود الفيديو احدى انجح الطرق لتخفيف النزاعات بين الأطراف المتعاقدة حيث يتم تطوير هذه العقود باستمرار لتعكس التطور الحاصل في قطاع الإنشاءات. لذا في عام 2017 تم اصدار نسخة جديدة من عقود فيديو – الكتاب الأحمر حيث تضمنت هذه النسخة تطور ملحوظ في آلية فض النزاعات في حال حدوثها بين الأطراف المتعاقدة.

عكفت هذه الدراسة على مناقشة وتحليل مدى كفاءة آلية فض النزاع في النسخة الجديدة من فيديو – الكتاب الأحمر حيث هدفت النسخة الجديدة إلى جعل آلية فض النزاع أسرع وأوفر وأكثر فاعلية بل حتى تضمنت توجه في تفادي النزاع بين الأطراف قدر المستطاع ويظهر ذلك جلياً في خلق مهمة جديدة لهيئة فض المنازعات ألا وهي العمل على تجنب النزاع بين الأطراف.

على الرغم من الإنتشار الواسع لعقود فيديو – الكتاب الأحمر في دولة الإمارات العربية المتحدة نجد القليل من عقود المقاولات في الإمارات تتضمن آلية لفض المنازعات حال حدوثها، وقد سلطت هذه الدراسة الضوء على الأسباب وراء ذلك مع ذكر التطوير الحاصل في آلية فض النزاعات في النسخة الجديدة من فيديو – الكتاب الأحمر وما إذا كان هذا التطور سيعمل على زيادة استخدام هذه الآلية لفض النزاعات في عقود البناء الجديدة. لذا تم دراسة الكتابات السابقة والمراجع فيما يتعلق بالمطالبات وآليات فض النزاع في عقود فيديو، كما تم استخدام استبيان خاص وزع على المحترفين في هذا المجال من شتى القطاعات لجمع أكبر عدد من البيانات والآراء للتحليل وإتمام الدراسة فيما يخص آلية فض النزاعات في عقود فيديو الجديدة وتطورها.

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CHAPTER ONE

INTRODUCTION

1.1 Background

Every construction project is unique and has different challenges along the course of the project, either in the design stage or during execution. For that and other reasons, such as the complexity of the construction project and the involvement of different parties, some disputes may arise between the two main parties in the project (the employer and the contractor). In fact, in most construction projects, disputes between the employer and the contractor are unavoidable due to the nature of the construction contract, where the parties usually have different perspectives on the key elements of the construction contract: the cost, timeliness, and quality of the works.

There are several reasons that lead to disputes between the contracting parties, mostly when the cost, timeliness, or quality of the works is affected by an action from one party without reasonable remedy from the other party, especially if the contract contains ambiguous terms and conditions. The complexity of the construction process is another reason for disputes between the parties. Still other reasons may also lead to different levels of disputes in construction projects, so a specific procedure is needed to resolve such disputes.

Different dispute resolution mechanism can be adopted in the construction contract based on the nature of the dispute and the relation between the parties. Usually, the selection of a specific dispute resolution mechanism takes into consideration the cost, the timeframe to

finally resolve the dispute, the enforceability of the mechanism's outcomes, and the availability of interim relief. The more the contract contains clear procedures to resolve disputes when they arise, the more smoothly the project goes. Therefore, it is recommended to use a standard form of contract to attain certainty in the contract terms, as these standard forms are tested over years on a wide range of projects and keep developing over time.

The FIDIC standard forms of contracts are considered the most-used forms of contracts in the world. Recently, FIDIC has launched a new revision of their standard forms of contracts to address the industry's feedback on the previous revision and to achieve clarity, transparency, and certainty, as well as to balance the risk allocation between the employer and the contractor.

One of the major amendments to the new FIDIC suit is the dispute resolution mechanism; this amendment aims to make the process of resolving the disputes in construction projects faster, cheaper, and more effective. In fact, the new forms are intended to avoid disputes between the parties by providing dispute avoidance roles to the dispute board. This study will discuss and analyse the efficiency of the developed dispute resolution mechanism in The 2017 FIDIC Red Book.

1.2 Aim and Objectives

The dissertation aims to examine the efficiency of the dispute resolution mechanism under The 2017 FIDIC Red Book; this aim is fortified by the following objectives:

- a. To set up a ground for testing the new DAAB roles in construction projects.

- b. To analyse the improvement of the dispute resolution mechanism under the FIDIC Red Book.
- c. To examine and explain the new claim and dispute resolution procedures under the new FIDIC Red Book.
- d. To determine whether the development of the dispute resolution mechanism under The 2017 FIDIC Red Book will encourage the construction industry (especially in the UAE) to adopt this mechanism in construction contracts.
- e. To understand the roots of the disputes in construction contracts.

1.3 Significance of the Research

Disputes in construction projects are inevitable; therefore, it is very important for construction projects to have a clear and efficient dispute resolution mechanism prior to going for litigation or arbitration, as this will save the parties' time and money, guarantee smooth completion of the project, and maintain a good relationship between the parties.

FIDIC has developed the dispute resolution mechanism in the 2017 Red Book to make the process more efficient. Although the FIDIC Red Book is broadly used in the UAE, very few projects implement the FIDIC Red Book dispute resolution mechanism to resolve disputes. This study will highlight the reasons behind that and whether the updated mechanism in the 2017 Red Book will encourage professionals to adopt it in new construction projects.

Since the new revision of the FIDIC Red Book was recently launched, there are few studies dealing in detail with the new 2017 Red Book. The findings of this research are expected

to shed light on the improvement of the dispute resolution mechanism under the 2017 Red Book and help construction professionals to understand the importance of an efficient dispute resolution mechanism in construction projects.

1.4 Scope of the dissertation

This study will deal with the dispute resolution mechanism under The 2017 FIDIC Red Book (mainly Clause 21 – Dispute and Arbitration) and identify the improvement from the 1999 FIDIC Red Book and the expected effect of this improvement on the construction industry in the UAE, since the FIDIC Red Book is widely used in the UAE.

However, since disputes are mostly related to claims for payments, extension of time, and extension of the defects notification period, the related clauses will be discussed as well (Clause 20 – Employer’s and Contractor’s Claims and Sub-Clause 3.7 – Agreement and Determination of the engineer’s Role for Any Claim).

1.5 Structure of the Research

The dissertation consists of seven chapters as follows:

1. Chapter One includes general background and introduction about construction disputes and dispute resolution mechanisms in the construction industry. It also provides a roadmap describing the goals of the study, the significance of the research, the methodology used, and the overall structure of the dissertation.
2. Chapter Two: Key Features of The 2017 FIDIC Red Book

This chapter discusses the new revision of the FIDIC Red Book, which was launched in 2017, and the major changes from the 1999 FIDIC Red Book.

3. Chapter Three: Employer's and Contractor's Claims

This chapter analyses the nature and types of claims in construction projects, the procedure for claims determination, and the relation between claims and disputes in construction contracts.

4. Chapter Four: The Dispute Avoidance/Adjudication Board (DAAB)

This chapter studies the various aspects of the dispute board, including the new DAAB procedure, the composition of the DAAB, the advantages and disadvantages of using DAAB, the evolution of dispute resolution over the years, and the UAE's position with regard to DAAB.

5. Chapter Five: The Dispute Resolution

This chapter discusses the DAAB decisions as a dispute resolution, the negotiation stage, which is the final option to resolve a dispute amicably, and arbitration, which is the parties' last resort to resolve their disputes.

6. Chapter Six: Survey Findings and Analysis

This chapter analyses and interprets the data collected from the survey questionnaire which was conducted for this research; graphical interpretation of the survey findings is presented as well for more clarity.

7. Chapter Seven: Conclusion and Recommendations

This chapter concludes and summarizes the dispute resolution mechanism under The 2017 FIDIC Red Book and provides recommendations based on the analysis results and the industry review.

1.6 Research Methodology

The methodology adopted in this research consists of doctrinal research, in which previous literatures including books, reports and journal articles related to disputes and the dispute resolution mechanism under the FIDIC Red Book are analysed, supported by the empirical verification approach using opinions of construction professionals, construction law experts and construction contract professionals by means of a survey questionnaire to compare the new dispute resolution mechanism to the industry practice and to identify the improvement from the previous version of the FIDIC Red Book.

The literature review was undertaken on the claims and dispute resolution mechanism under FIDIC standard forms of contracts with analysis of the main and subordinate literature sources. The online survey questionnaire was distributed to construction professionals at different levels (including contractors, employers, engineers, lawyers, and others) to collect a considerable amount of data to complete the required data analysis on the new FIDIC Red Book and its developed dispute resolution mechanism. The questionnaire's outcomes are presented and discussed in Chapter Six.

1.7 Literature Overview

Few studies have discussed the new 2017 FIDC Red Book, as it was launched recently. Therefore, literature about the 1999 FIDIC Red Book was initially reviewed which generally discussed the gaps in the dispute resolution mechanism under the 1999 FIDIC Red Book, such as the effectiveness of DAB (Dispute Adjudication Board) in resolving construction disputes, the enforcement of DAB awards, the establishment of the DB (Dispute Board), the concept of the ad-hoc dispute board, etc.

It has also been noticed that very few articles discussed the DB in the UAE or the Middle East, as this type of dispute resolution is rarely used in this region. Therefore, this research will identify the reasons behind that through the research questionnaire and see if the new revision of the FIDIC Red Book will encourage the UAE and Middle Eastern construction industry to adopt the DAAB (Dispute Avoidance/Adjudication Board) for construction dispute resolution.

Finally, most of the articles reviewed discussed only one part of the dispute resolution mechanism under FIDIC standard forms of contracts, so this study will discuss and analyse all major issues related to the dispute resolution mechanism under the FIDIC Red Book in the construction industry and analyse whether the 2017 version has overcome all these issues.

CHAPTER TWO

KEY FEATURES OF THE 2017 FIDIC RED BOOK

2.1 Introduction

The passage of time makes it necessary to update different aspects to ensure that the best solutions to problems are provided. Standards, rules, and regulations are not an exception. December 2017 marked such an update when FIDIC launched its updated and more conventional second edition of its 1999 “rainbow suite” forms of contracts¹.

This launch of FIDIC 2017 is regarded as a strategic step because it is one of the most famous standard forms of contracts that are used in international building, energy, and infrastructure work. This chapter will focus on the key features of the updated version 2017 FIDIC Red Book (for building and engineering work designed by the employer), which has set implications for contract administration and management across all standardized aspects. It is important to recognise the changes that were made to the 1999 FIDIC Red book, which will be of keen interest to employers, contractors, and engineers operating in the region².

¹ FIDIC has officially launched the much anticipated 2017 FIDIC Suite of Contracts at the FIDIC International Users' conference in London in December 2017

² Níav O'Higgins, Karen Killoran and Niamh McGovern, 'Updated FIDIC Contracts 2017: What has Changed?' (2018) Arthur Cox <<http://www.arthurcox.com/publications/updated-fidic-contracts-2017-changed/>> accessed 15 July 2018

There are several areas that FIDIC is aiming to improve in the new revision, which was deemed to be necessary for a leading construction contract standardization organization such as FIDIC, as highlighted in the event³ when FIDIC launched the new revision. These areas include⁴:

- a) Enhancing the project management mechanisms and tools.
- b) Achieving balanced risk allocation between parties using more reciprocity between the parties.
- c) Strengthening the role of the engineer.
- d) Achieving certainty, clarity, and transparency.
- e) Incorporating the current international best practice.
- f) Addressing the issues raised by the users of the 1999 edition.⁵

2.2 Structure and Terminology

Although the structure of the revised edition has much in common with that of the 1999 edition, the new edition is almost 60% longer and contains 21 clauses instead of 20, as in the 1999 edition, due to FIDIC's decision to split claims and dispute resolution into two clauses (Clause 20 – Employer's and Contractor's Claims and Clause 21 – Disputes and Arbitration). However, the clauses are in the same order, except Clauses 18 and 19, which

³ The official launch of The 2017 FIDIC Suite of Contracts at the FIDIC International Users' conference in London in December 2017

⁴ Glover Jeremy, 'Changes to the FIDIC Form of Contract' (2016) Fenwick Elliott <<https://www.fenwickelliott.com/research-insight/annual-review/2016/changes-fidic-form-contract>> accessed 15 August 2018

⁵ Previous comments to be complied with (In a footnote, give examples of these issues).

have been reversed (i.e., “Exceptional Events” which was known as force majeure is described in Clause 18, while Clause 19 deals with the insurance aspect)⁶.

Moreover, the 2017 Red Book provides much more clarity to the defined terms. As an example, the term “notice” is well defined with some requirements to be fulfilled in order to avoid informal notices. Also, all definitions are in alphabetical order in one section instead of being subdivided between topics. Moreover, the new revision provides more divisions and subheadings within the sub-clauses, which will reduce the difficulties of there being multiple paragraphs within the sub-clauses⁷.

The new revision continues to have optional Contract Agreement, DAAB Procedural Rules, and Guidance for the preparation of Particular Conditions, which now contains Contact Data (which was regarded as Appendix to Tender) and some other contract documents templates like Letters of Tender, Letter of Acceptance and agreement for Dispute Avoidance/Adjudication.

It had always been an area of FIDIC’s expertise and pride that it had balanced and fair approach when dealing with risk allocations in the Red and Yellow Books. This aspect had

⁶ Adrian Bell, Aidan Steensma and Victoria Peckett, ‘CMS guide to the FIDIC 2017 suite’ (2017) CMS Law-Now <<https://www.cms-lawnow.com/publications/2017/12/new-fidic-second-editions-cms-guide-to-the-fidic-2017-suite>> accessed 19 July 2018

⁷ Niam O’Higgins, Karen Killoran and Niamh McGovern, ‘Updated FIDIC Contracts 2017: What has Changed?’ (2018) Arthur Cox <<http://www.arthurcox.com/publications/updated-fidic-contracts-2017-changed/>> accessed 15 July 2018

been further comprehending and explained in the 2017 edition to enhance the number of rights and obligations in the reciprocal state⁸.

Although FIDIC takes the opportunity in the new edition to incorporate various provisions with regard to best practices and enhances processes by providing a detailed step-by-step description of the major processes such as payment and claim procedures, these enhancements have a practical implication: increasing the parties' burden to control and observe various aspects for the purpose of practical implementation⁹. For example, the contract price, variations, and claims should all be well noted and observed by all parties. The interim and financial accounts must be well perceived, while any kind of potential variations which might appear should be well handled and well observed.

In the next sections, the most important updates in the new revision of the Red Book will be emphasized.

2.3 Programming and Time Requirements

Sub-Clause 8.3 has been extended to fundamentally incorporate more insight regarding the contractor's programme. Now the programming software to be utilized can be expressly mentioned in the contract. The Contract determines the quantity of paper and electronic duplicates to be submitted by the contractor. More details are incorporated with respect to what each programme must show, including, for instance, the critical path(s) and logical

⁸ Adrian Bell, Aidan Steensma and Victoria Peckett, 'CMS guide to the FIDIC 2017 suite' (2017) CMS Law-Now <<https://www.cms-lawnow.com/publications/2017/12/new-fidic-second-editions-cms-guide-to-the-fidic-2017-suite>> accessed 19 July 2018

⁹ Ibid

links between the activities¹⁰. The testing programme is now required to be submitted separately, as set out in Sub-Clause 9.1.

2.3.1 Modifications to Programming Requirements

The programming requirements in The 2017 FIDIC Red Book are more specific and detailed; Clause 8.3 [Programme] now imposes the following new requirements (among others) to be included within the programme for the works to be submitted by the contractor¹¹:

- a) The commencement date and the time for completion of the works and of each section (if any).
- b) The site possession date, as stated in the Contract Data.
- c) The review time required for any submission according to the specifications.
- d) The sequence and timing of the remedial work (if any) for a revised programme.
- e) All activities shall be logically linked with start and finish dates as well as critical paths (if any).
- f) All days off and holidays those are recognized locally.
- g) All dates for delivery of the plant and key materials.
- h) In the revised programme, the actual progress for each activity, any delay (if any), and the effects of such delay on the programme.

¹⁰ Mahesh Rai, 'FIDIC 2017 update – Changes in Contract Administration and Management' (2018) Drew Napier Legal Update

¹¹ Ibid

Additionally, the supporting documents that have to be submitted along with the programme in the new revision are more detailed and particular.

The new revision imposes on the engineer the obligation to review and give a notice of no-objection on the initial programme within 21 days and on the revised programme within 14 days from the date of receiving the programme¹². However, if the engineer fails to do so, the programme shall be deemed to have given a no-objection by the engineer.

2.3.2 Advance Warning

Sub-Clause 8.4 [Advance Warning] is a new aspect of the new edition that requires the contractor and the employer as well as the engineer to give advance warning of any circumstances that may affect the performance of the works or the contract price and/or delay the execution of the works. However, FIDIC has not provided any time limit for giving an advance warning, nor is there any express provision in case of failure to comply with this requirement in any assessment of additional payment and/or extension of time.¹³

In general, the revised clauses related to programme and time represent a remarkable step toward a further proactive Contract management and execution of the works.

¹² Glover Jeremy, 'The Second Edition of the FIDIC Rainbow Suite has arrived' (2017) Fenwick Elliott <<https://www.fenwickelliott.com/research-insight/articles-papers/other/second-edition-fidic-rainbow-suite>> accessed 10 August 2018

¹³ Peter Fogh, Niklas Korsgaard Christensen and Anne-Sophie Truelsen, 'New FIDIC Forms of Contract: Plesner Insight on the new FIDIC Red, Yellow and Silver Books' (2017) Plesner <https://www.plesner.com/insights/articles/2017/12/revision-af-fidics-red-yellow-og-silver-book-2017?sc_lang=en> accessed 31 October 2018

2.3.3 Programming and Extension of Time

The contractor is entitled to claim an extension of time based on grounds which are presently set out in Sub-Clause 8.5 that remain to some extent unaltered. However, the contractor can now claim an EOT for a delay caused by a variation within the claim, and he/she is entitled to claim an EOT for a delay caused by an increase of the quantity by 10% or more from the estimated quantity; also, the delay for “exceptionally adverse climatic conditions” has been regarded as “Unforeseeable having regard to climatic data.”¹⁴

The last paragraph of Sub-Clause 8.5 highlights the situation of a concurrent delay in the project; it proposes that the concurrent delay be dealt with in accordance with the relevant particular conditions. This will arguably create a considerable debate in the event of concurrent delay, especially when there are no special provisions dealing with concurrent delay¹⁵. As the parties will refer to the statement “as appropriate taking due regard of all relevant circumstances”, such debate may include questions such as: Must the delay periods be on the critical path? Do the Contending events have to have equivalent causative strength? Nevertheless, this paragraph highlights that parties must take due care during

¹⁴ Glover Jeremy, ‘The Second Edition of the FIDIC Rainbow Suite has arrived’ (2017) Fenwick Elliott < <https://www.fenwickelliott.com/research-insight/articles-papers/other/second-edition-fidic-rainbow-suite>> accessed 10 August 2018

¹⁵ Adrian Bell, Aidan Steensma and Victoria Peckett, ‘CMS guide to the FIDIC 2017 suite’ (2017) CMS Law-Now < <https://www.cms-lawnow.com/publications/2017/12/new-fidic-second-editions-cms-guide-to-the-fidic-2017-suite>> accessed 19 July 2018

preparation of the particular conditions to include a provision for concurrent delay to avoid potential disputes¹⁶.

2.3.4 Termination of the Contract

The provisions for termination of the contract have been reasonably modified, and new termination triggers have been added to the provisions, which include¹⁷:

- a) The contractor's failure to comply with the engineer's determination or DAAB's decision subject to such failure constitutes a material breach of the Contract.
- b) If the delay damages exceeded the amount stated in the Contract Data.
- c) If the contractor is found engaged in fraudulent, corruption, coercive, or collusive practices in relation to the contract.
- d) The Commencement Date notification shall be sent to the contractor within 84 days after the Letter of Acceptance, otherwise it is the contractor right to terminate the Contract.

On the other hand, termination for convenience now requires the employer to pay loss of profit and other losses and damages suffered by the contractor¹⁸.

2.3.5 Exceptional Events

¹⁶ Ibid

¹⁷ Ibid

¹⁸ Michael Grose and Others, 'FIDIC Red Book 2017 A MENA perspective' (2017) CLYDE&CO <<https://www.clydeco.com/insight/article/fidic-red-book-2017-a-mena-perspective>> accessed 20 October 2018

Clause 18 now includes the old force majeure term, which is now classified as “Exceptional Events”. This clause remains mostly unaltered to its predecessor; nevertheless, the list of particular exceptional events has been extended, and tsunami has been added as a natural event. Thus, contractor will be entitled for additional payment if any such event might occur. Clause 18.2 had been clarified that an Exceptional Event is the only case when a party will be excused from performing the contractual obligations.¹⁹

2.4 Variations

Variations are among the most important factors in any construction project; therefore, the variation clause has been modified to become clearer in the new version of the FIDIC Red Book.

2.4.1 New Variations Procedure

Two methods of variation are distinguished in the new revision:

- a. Variation by Instruction
- b. Request for Proposal

However, in both cases, the contractor is required to submit a detailed proposal that contains the resources and method of statement, the programme for executing and

¹⁹ Ibid

completing the variation work, the proposal for modifying the contract price, and the baseline programme and any-time related cost. All should be supported with particulars²⁰.

Additionally, the contractor has the right under Sub-Clause 3.5 to notify the engineer of any instruction that constitutes a variation from the contractor's point of view. If the engineer does not respond within 7 days of receiving such notification, then the instruction will be considered revoked.²¹

The new variation procedure grants the contractor the right to claim cost compensation in case the proposal is rejected by the employer, as the contractor needs to assign a huge commercial team to comply with the requirements for each proposal, and this will make employers more cautious before requesting any proposal²². Similarly, the contractor is entitled for loss of profit and other damages if a variation consists of omission of work, which is to be carried out by others if both parties agree.

One of the important changes in variation provisions is the law provision, which now considers the changes in any permit or permits' requirements as a change in law; however,

²⁰ Peter Fogh, Niklas Korsgaard Christensen and Anne-Sophie Truelsen, 'New FIDIC Forms of Contract: Plesner Insight on the new FIDIC Red, Yellow and Silver Books' (2017) Plesner <https://www.plesner.com/insights/articles/2017/12/revision-af-fidics-red-yellow-og-silver-book-2017?sc_lang=en> accessed 29 August 2018

²¹ Niamh O'Higgins, Karen Killoran and Niamh McGovern, 'Updated FIDIC Contracts 2017: What has Changed?' (2018) Arthur Cox <<http://www.arthurcox.com/publications/updated-fidic-contracts-2017-changed/>> accessed 15 July 2017

²² Mahesh Rai, 'FIDIC 2017 update – Changes in Contract Administration and Management' (2018) Drew Napier Legal Update

if the change in law reduces the related cost, then the employer can claim reduction in the contract price for the same.²³

2.4.2 Contractor Objection to a Variation

Like in the previous revision of the Red Book, there are some cases in which the variation can be objected to by the contractor in the new variation procedure. These cases have been expanded to include²⁴:

- a. If the varied work was unforeseeable.
- b. If the contractor's obligations regarding health and safety as well as the environment will be affected by the variation.
- c. If the contractor's ability to comply with the fitness for purpose obligations (if any) will be affected by the variation.

2.5 Payments

²³ Adrian Bell, Aidan Steensma and Victoria Peckett, 'CMS guide to the FIDIC 2017 suite' (2017) CMS Law-Now < <https://www.cms-lawnow.com/publications/2017/12/new-fidic-second-editions-cms-guide-to-the-fidic-2017-suite> > accessed 19 July 2018

²⁴ Ibid

A few important changes to payments provisions have been made in the new revision. The first one is related to advance payment, which will be only applicable if stated in the Contract Data and the employer is able to call on the full Advance Payment Guarantee Amount if it is not extended 7 days prior to its expiry. Second, the engineer must include supporting documents for any difference between the certified and applied amount in the Interim Payment Certificate (IPC). The last one is related to final payment – the contractor must claim any difference between the certified and applied amounts within 56 days of the Final Payment Certificate; otherwise, he/she shall be deemed to accept it.²⁵

2.6 Cost and Profit

The term “Cost” now includes reference to taxes, and the Contract Data should include the profit for any Cost plus Profit items; otherwise, 5% profit will apply. Furthermore, the contractor is entitled to apply for loss of profit for any omission work or termination for convenience.²⁶

2.7 Value Engineering

The value engineering provisions now allow the contractor to share the net benefit gained from any value engineering proposal, which will encourage the contractor to do so.²⁷

²⁵ Ibid

²⁶ Níav O’Higgins, Karen Killoran and Niamh McGovern, ‘Updated FIDIC Contracts 2017: What has Changed?’ (2018) Arthur Cox <<http://www.arthurcox.com/publications/updated-fidic-contracts-2017-changed/>> accessed 5 October 2018

²⁷ Jakob Sorensen, ‘FIDIC Conditions of Contract – 2017 update’ (2017) Holst Advokater

2.8 Claims and Notices

The procedure for contractors' and employers' claims is one of the most significant areas of changes in The 2017 FIDIC Red Book. Now, there is a single claims procedure which applies to both the employer and the contractor; this is considered as a key part of FIDIC's attempts to reach balance and reciprocity between the two parties²⁸. This will certainly place an additional burden on both the employer and the contractor to follow the new administrative requirements.

2.8.1 Claims Notification

The term "notice" is now well defined and mandatory for any claims. The requirements for notices are included in around 80 places in the new Red Book²⁹. Therefore, parties should provide formal notice for any claim within the specified timeframe; otherwise, the claim will be considered time-lapsed and no longer valid.³⁰

Arguably, this may force the parties to increase the number of claims to avoid losing their right to make claims; however, this will not necessarily increase the number of disputes between parties.

²⁸ Adrian Bell, Aidan Steensma and Victoria Peckett, 'CMS guide to the FIDIC 2017 suite' (2017) CMS Law-Now < <https://www.cms-lawnow.com/publications/2017/12/new-fidic-second-editions-cms-guide-to-the-fidic-2017-suite>> accessed 19 July 2018

²⁹ Michael Grose and Others, 'FIDIC Red Book 2017 A MENA perspective' (2017) CLYDE&CO < <https://www.clydeco.com/insight/article/fidic-red-book-2017-a-mena-perspective>> accessed 20 October 2018

³⁰ Ibid

2.8.2 Determining Claims

Since the engineer has many expanded strategic roles in administrating the contract, the engineer is under obligation to make neutral determination of any claim within 42 days from the date of receiving the claim. However, the claim will be considered rejected if the engineer fails to do so. Furthermore, prior to doing that, the engineer is under obligation to consult with and encourage both parties to reach an agreement within 42 days from the date of the claim.³¹

Claims and notices will be discussed in more detail in Chapter Three.

2.9 The New Dispute Resolution Provisions

The dispute resolution provisions are subject to some of the most prominent changes in the new FIDIC Red Book as part of FIDIC's goals to enhance the overall contract administration toward dispute avoidance³². Therefore, the Dispute Board has been given a new dispute avoidance role (hence the name change to Dispute Avoidance/Adjudication Board), whereby informal assistance or unbinding advice can be provided to the parties if they ask the DAAB to provide such opinion³³.

³¹ Ibid

³² Adrian Bell, Aidan Steensma and Victoria Peckett, 'CMS guide to the FIDIC 2017 suite' (2017) CMS Law-Now < <https://www.cms-lawnow.com/publications/2017/12/new-fidic-second-editions-cms-guide-to-the-fidic-2017-suite> > accessed 19 July 2018

³³ Stephenson Harwood, 'Dispute resolution under FIDIC 2017' (2018) < <http://www.shlegal.com/insights/dispute-resolution-under-fidic-2017> > accessed 20 August 2018

The main features of the new dispute avoidance/resolution provisions under the new revision of the FIDIC Red Book are:³⁴

- a. Splitting claims and dispute resolution into two clauses to make it clear that a dispute does not exist by default when a claim is submitted.
- b. Modifying the engineer's roles during the contract administration by adding an obligation to encourage parties to reach an agreement of a claim and to act neutrally when make a claim Determination.
- c. The new roles of the Dispute Board and the new dispute resolution procedure.
- d. More procedural aspects for the claims, the required notices, and variations.
- e. The concept of advance warning, which aims to encourage parties to collaborate in resolving potential problems.

Moreover, the new DAAB provisions have been expanded significantly, including the following:³⁵

- a. Regular site visits and meetings with the parties are required to be conducted by the DAAB.
- b. The DAAB's decisions are binding on both parties as well as the engineer.
- c. Compliance with the DAAB's decisions is a must, even when parties submit a Notice of Dissatisfaction.

³⁴ Glover Jeremy, 'The Second Edition of the FIDIC Rainbow Suite has arrived' (2017) Fenwick Elliott < <https://www.fenwickelliott.com/research-insight/articles-papers/other/second-edition-fidic-rainbow-suite>> accessed 10 August 2018

³⁵ Michael Blackburne, 'The New FIDIC 2017 Yellow Book – what you need to know' (2017) DAC beachcroft < <https://www.dacbeachcroft.com/en/gb/articles/2017/october/the-new-fidic-2017-yellow-book-what-you-need-to-know/>> accessed 20 August 2018

- d. Any monetary sum awarded by the DAAB is immediately due, and security for such amount can be requested by the DAAB.

The new dispute resolution mechanism will be discussed in more detail in Chapters Four and Five.

2.10 The Contracting Parties

In the new version of the FIDIC Red Book, FIDIC considers the best practices and industry feedback over the past 17 years of using the 1999 edition. Therefore, some changes related to the parties involved in construction contracts (contractor, employer, and engineer) have been made in the new revision. In this section, some key changes for the same are highlighted.³⁶

2.10.1 The Contractor

- a. The core obligation of the contractor has been simplified to executing the works in accordance with the Contract.³⁷
- b. The contractor's design obligations (if specified in the contract) have been expanded.³⁸
- c. The contractor must indemnify the employer for all design errors (that designed by the contractor) which the works did not fit for purpose.³⁹

³⁶ Michael Grose and Others, 'FIDIC Red Book 2017 A MENA perspective' (2017) CLYDE&CO <<https://www.clydeco.com/insight/article/fidic-red-book-2017-a-mena-perspective>> accessed 20 October 2018

³⁷ The 2017 FIDIC Red Book Sub-Clause 4.1 [*Contractor's General Obligations*]

³⁸ Ibid

³⁹ The 2017 FIDIC Red Book Sub-Clause 17.4 [*Indemnities by Contractor*]

- d. The engineer must give no objection to the contractor's documents for the construction to commence.⁴⁰
- e. The Quality Assurance Clause is more detailed and includes requirements that the contractor implement a quality management system (QMS) and a compliance verification system (CVS).⁴¹
- f. The engineer must give no objection to the contractor's close-out documents for the works to be considered as completed for taking over; close-out documents include as-built drawings, O&M manuals, and training records.⁴²

2.10.2 The Employer

- a. The Employer Financial Arrangements shall be set out in the Contract Data and do not need a request from the contractor to be provided.⁴³
- b. The contractor can request evidence for the employer's financial arrangement if he/she receives instruction to execute a variation work of 10% of the accepted contract amount or if the total amount of the variations exceeds 30% of the accepted contract amount.⁴⁴
- c. A request can be made to adjust the contractor's performance security if there is more than a 20% change to the contract price as a result of variations and adjustment.⁴⁵

⁴⁰ The 2017 FIDIC Red Book Sub-Clause 4.4 [*Contractor's Documents*]

⁴¹ The 2017 FIDIC Red Book Sub-Clause 4.9 [*Quality Management and Compliance Verification Systems*]

⁴² The 2017 FIDIC Red Book Sub-Clause 10.1 [*Taking Over of the Works and Sections*]

⁴³ The 2017 FIDIC Red Book Sub-Clause 2.4 [*Employer's Financial Arrangements*]

⁴⁴ Ibid

⁴⁵ The 2017 FIDIC Red Book Sub-Clause 4.2 [*Performance Security*]

- d. If the contractor suffers a delay or additional cost due to non-availability or non-suitability of the access route due to a change in the access route by the employer after the base date, then he/she is entitled to EOT or additional cost.⁴⁶
- e. The contractor's liability for latent defects in the plant shall end two years after DNP unless otherwise required by the law.⁴⁷

2.10.3 The Engineer

- a. The engineer must be fluent in the contract language and qualified and experienced to act as engineer under the contract.⁴⁸
- b. The employer's consent for the engineer's determination is not required.⁴⁹
- c. The engineer must work in a neutral context when making a claim determination.⁵⁰
- d. The engineer is under obligation to encourage the parties to reach an agreement before making a determination.⁵¹
- e. Failure of the engineer to make a determination within the specified time will result in the claim being deemed as rejected.⁵²

⁴⁶ The 2017 FIDIC Red Book Sub-Clause 4.15 [*Access Route*]

⁴⁷ The 2017 FIDIC Red Book Sub-Clause 11.10 [*Unfulfilled Obligations*]

⁴⁸ The 2017 FIDIC Red Book Sub-Clause 3.1 [*The Engineer*]

⁴⁹ The 2017 FIDIC Red Book Sub-Clause 3.2 [*Engineer's Duties and Authority*]

⁵⁰ The 2017 FIDIC Red Book Sub-Clause 3.7 [*Agreement or Determination*]

⁵¹ *Ibid*

⁵² *Ibid*

CHAPTER THREE

EMPLOYER'S AND CONTRACTOR'S CLAIM

3.1 Introduction

The complexity of construction contracts makes disputes between the parties inevitable, even when the parties choose to use one of the standard forms of contracts such as FIDIC standard forms. However, FIDIC recognizes this fact and continues to improve the claims procedure in its standard forms of contracts.⁵³

The 2017 FIDIC Red Book includes more detailed provisions for notices and time bars with regards to claims and disputes, which increases the burden on the parties and the engineer of administering the contract⁵⁴. This is because the parties must follow the claim procedure set out in the contract.

3.2 Claim's Definition in construction industry

The new version of the FIDIC Red Book has defined the terms used in the conditions of the contract in order to avoid misinterpretation of any important terms during the construction process⁵⁵, so the term “claim” is now defined as a request or affirmation by

⁵³ Jonathan Hosie, 'Employer's financial arrangements and claims under FIDIC forms of contract' (2016) Construction Law Review Chartered Institution of Civil Engineering

⁵⁴ Stephenson Harwood, 'Dispute resolution under FIDIC 2017' (2018) < <http://www.shlegal.com/insights/dispute-resolution-under-fidic-2017>> accessed 31 October 2018

⁵⁵ Nael Bunni, *The FIDIC Forms of Contract* (3rd edn, Blackwell Publishing, Oxford 2005) 293

one party to the other for an entitlement or relief under the terms of the contract, and a dispute arises when it is rejected⁵⁶.

In general, a party may submit a claim in the following circumstances⁵⁷:

- Entitlement to additional payments.
- Entitlement to recover a cost.
- Entitlement for an extension of time.
- Party's failure to fulfil an obligation under the contract.
- Legal entitlement for additional payments.

3.3 Claims under The 2017 FIDIC Red Book

In construction projects, most claims are submitted by the contractor for additional payments or extension of time; however, the employer's claims usually are for reduction of the contract price or extension of the defect notification period (DNP)⁵⁸. Previously, the contractor's claims were separated from the employer's claims, and different procedures were required for each party's claims. The contractor's claims procedure was more detailed and complicated compared to the employer's claims, as the latter controls the money⁵⁹, but in the new version, in order to achieve clarity, balanced risk allocations, and reciprocity between the parties' obligations, FIDIC decided to have one claim procedure for both

⁵⁶ Christopher R. Seppälä, 'Contractor's Claims Under The FIDIC Contracts For Major Works' (2005) *Construction Law Journal London*

⁵⁷ Andy Hewitt, *Construction Claims and Responses: Effective Writing and Presentation* (2nd edn, Wiley Blackwell, UK 2016) 315

⁵⁸ Ruveyda Komurlu and David Arditi, 'The Role of General Conditions relative to Claims and Disputes in Building Construction Contracts' (2017) Vol. 4, No. 2 *International Journal of Contemporary Architecture* 29

⁵⁹ Jakob Sorensen, 'FIDIC Conditions of Contract – 2017 update' (2017) *Holst Advokater*

parties under Clause 20 [Employer's and Contractor's Claims]. The separation from the dispute resolution Clause 21 [Disputes and Arbitrations] is to emphasise that a claim does not necessary constitute a dispute⁶⁰.

3.3.1 Key Changes to Claim Provisions under The 2017 FIDIC Red Book

The new revision of the FIDIC Red Book emphasises the need for reciprocity between the obligations of the parties⁶¹. To this end, significant changes to parties' claims provision have been made in the new FIDIC Red Book. This includes the following:

- a. Separating the claims provisions from the dispute provisions. This separation aims to direct the parties to the fact that not every claim is a dispute.
- b. Clause 20 [Employer's and Contractor's Claims] in the new FIDIC Red Book deals with the employer's claims the same as the contractor's claims⁶², using the same rules and claims procedure, unlike the 1999 edition, which dealt with the employer's claims differently than the contractor's claims in separate clauses, Clause 2.5 for the employer's claims and Clause 20.1 for the contractor's claims, which were considered more procedural and complicated than the employer's claims⁶³. Furthermore, in the new edition, the term claiming party is used as a party-neutral term, which eliminates the privilege of one party over the other.

⁶⁰ Michael Blackburne, 'The New FIDIC 2017 Yellow Book – what you need to know' (2017) DAC beachcroft <<https://www.dacbeachcroft.com/en/gb/articles/2017/october/the-new-fidic-2017-yellow-book-what-you-need-to-know/>> accessed 20 August 2018

⁶¹ Mahesh Rai, 'FIDIC 2017 update – Changes in Contract Administration and Management' (2018) Drew Napier Legal Update

⁶² Ibid

⁶³ Nael G Bunni, 'A Comparative Analysis of the Claim & Dispute Resolution Provisions of FIDIC's 1999 Major Forms of Contract Against its Earlier Forms' (2006)

- c. Providing an advance warning system under the new Sub-Clause 8.4, this requires each party and the engineer to notify the other parties in advance of any known or probable events or circumstances which may increase the contract price, delay the work execution or affect the performance of the works. In all cases, the contractor may submit a proposal (upon the engineer's request) to avoid or minimize the effect of such event(s).⁶⁴
- d. Claims time bars have been set out in the new claims provisions, which require the claiming party to submit a Notice of Claims to the engineer within 28 days of awareness of such claim; a party's failure to do so will discharge the parties from any liabilities regarding that event, as the claim will be considered time barred⁶⁵.
- e. Similarly, fully detailed claims shall be submitted by the claiming party within 84 days (rather than 42 days under the 1999 edition) from the date of awareness of such claim; the required documents of the fully detailed claims are also listed in the new FIDID Red Book, which reduces the repeated arguments between the parties about whether the fully detailed claim submitted contains all the required documents (the 1999 edition required "full supporting Particulars" only, which was considered as a grey area)⁶⁶.

⁶⁴ Adrian Bell, Aidan Steensma and Victoria Peckett, 'CMS guide to the FIDIC 2017 suite' (2017) CMS Law-Now < <https://www.cms-lawnow.com/publications/2017/12/new-fidic-second-editions-cms-guide-to-the-fidic-2017-suite> > accessed 19 July 2018

⁶⁵ Mahesh Rai, 'FIDIC 2017 update – Changes in Contract Administration and Management' (2018) Drew Napier Legal Update

⁶⁶ Ibid

- f. Time Bar Waiver: The new claims provisions empower the engineer or DAAB to waive a compliance failure with the time bar provisions in making the engineer's determination or agreement as well as DAAB's decision related to the claim.⁶⁷

3.3.2 New Claim Procedure under The 2017 FIDIC Red Book

The claim procedure under the new FIDIC Red Book contains more details and requirements than the previous one; the following steps summarize the new procedure:

1. A claim notification (defining the event or context giving rise to the claim for additional cost, loss, delay, or extension of DNP) must be issued by the claiming party (the employer or the contractor) to the engineer as soon as practicable and within 28 days of the party's awareness of the circumstance or event giving rise to the claim. If the claiming party fails to submit the notification within this time limit, then the claim will be considered as time barred, and the other party becomes discharged from any liability related to the event giving rise to the claim.⁶⁸
2. If the engineer considers that the claim notification has been issued late and the claim becomes time barred, then the engineer must issue a notice to this effect to the claiming party within 14 days from the date of receiving the Notice of Claim. If the engineer does not issue such notice within 14 days, then the Notice of Claim is considered as valid notice.⁶⁹

⁶⁷ Stephenson Harwood, 'Dispute resolution under FIDIC 2017' (2018) < <http://www.shlegal.com/insights/dispute-resolution-under-fidic-2017>> accessed 31 October 2018

⁶⁸ Euan Lloyd, 'New FIDIC 2017 Yellow Book – A New Claims Procedure' (2017) Al Tamimi & Co < <https://www.tamimi.com/law-update-articles/new-fidic-2017-yellow-book-a-new-claims-procedure/>> accessed 16 November 2018

⁶⁹ Ibid

3. If the claiming party disagrees with the engineer's Notice of Late Submission, he/she should send disagreement notification to the engineer containing justification of the circumstances which caused the late submission. This justification must be included in the fully detailed claim as well.⁷⁰
4. Then the claiming party is required to submit fully detailed claim within 84 days from the date of the event or circumstance giving rise to the claim (longer period can be agreed between the parties). The fully detailed claim must⁷¹:
 - a. Describe in details the event or circumstance giving rise to the claim.
 - b. State the basis of the claim (Contractual or other legal basis).
 - c. Contains all contemporary records which the claiming party depends.
 - d. Contains detailed supporting particulars of the claim.
 - e. Justification of the late submission of the Notice of Claim if the engineer considers it as late submission.
5. If the claiming party fails to include or submit the statement of the contractual and/or legal basis of the claim within 84 days from the date of the party's awareness of the event or circumstance giving rise to the claim, then the Notice of Claim will be considered a time lapsed and it shall no longer be considered as a valid notice.
6. The engineer shall send time lapse notification to the claiming party with 14 days of receiving the detailed claim. If the engineer fails to do so, the notice shall be deemed valid.

⁷⁰ Ibid

⁷¹ Adrian Bell, Aidan Steensma and Victoria Peckett, 'CMS guide to the FIDIC 2017 suite' (2017) CMS Law-Now < <https://www.cms-lawnow.com/publications/2017/12/new-fidic-second-editions-cms-guide-to-the-fidic-2017-suite>> accessed 19 July 2018

7. If the claiming party disagrees with the engineer's notice of late submission, he/she should send disagreement notification to the engineer containing the details of disagreement.
8. In case a time-barred notice is issued by the engineer, parties can still dispute such notice. In this case, the engineer shall include a review in his/her determination as to whether the claim is time barred; this review is not limited to the time only but may also contain consideration of whether a late submission is justified on extensive grounds, such as if the receiving party has prior knowledge of the claim or absence of prejudice⁷².
9. Sub-Clause 20.2 empowers the engineer to waive any party's failure to comply with the time bar requirements when making his/her determination of a claim if the failure is found to be justified. However, if the other party is dissatisfied with the engineer's waiver, he/she can still refer the matter to the Dispute Board under Sub-Clause 21.4.
10. After the submission of the fully detailed claim, the engineer's duty is to consult with both parties within 42 days and encourage discussion and negotiations to reach an agreement.
11. In case no agreement is reached within the first 42 days, then the engineer shall make fair determination of the claim within further 42 days and notify both parties

⁷² Adrian Bell, Aidan Steensma and Victoria Peckett, 'CMS guide to the FIDIC 2017 suite' (2017) CMS Law-Now < <https://www.cms-lawnow.com/publications/2017/12/new-fidic-second-editions-cms-guide-to-the-fidic-2017-suite>> accessed 19 July 2018

of his/her determination. If the engineer fails to issue his/her determination at the end of this period, then the claim is considered as rejected by the engineer.

12. After the engineer's determination, the parties have 28 days to issue a Notice of Dissatisfaction of the engineer's determination. If neither party has issued such notice within 28 days, then the engineer's determination will be considered as final and binding on both parties.
13. If either party has issued a Notice of Dissatisfaction with regard to the engineer's determination, then within 42 days, the claim shall be referred to the DAAB; otherwise, the Notice of Dissatisfaction will be considered time lapsed, and the engineer's determination will become final and binding on both parties.
14. The DAAB must issue a decision within 84 days from the date of receiving the claim.
15. Again, if one party is dissatisfied with the DAAB's decision, then the party can challenge the DAAB's decision via arbitration proceeding. In this case, the dissatisfied party must issue a Notice of Dissatisfaction with regard to the DAAB's decision within 28 days; otherwise, the DAAB's decision will be considered as final and binding.
16. Before the arbitration proceeding commences, the parties are required to attempt to negotiate the claim and try to reach an amicable settlement within 28 days. If no agreement has been reached between the parties, then the arbitration proceeding will start. However, there is no time limit specified for the arbitration proceedings; mostly, the applicable law will impose the limitation period.

17. If the claim involves events or circumstances with continuing effect, then an interim fully detailed claim must be submitted to the engineer within 84 days of the trigger date. However, further fully detailed claims must be submitted on a monthly basis thereafter until the final fully detailed claim is submitted at the end of the continuous event or circumstance. The engineer shall seek the parties' agreement and/or determine the legal basis of the claim after the first interim fully detailed claim; when the final fully detailed claim is submitted, the engineer shall proceed to seek the parties' agreement and/or make his/her determination of the claim.
18. Notification of Claims other than for additional payment or extension of time must be sent as soon as practicable. The engineer shall proceed to seek the parties' agreement and/or determine the claim. Late notification of these claims does not seem to affect the entitlement of the claiming party.
19. Now, all notices must be clearly titled as "Notice".

The total period of time required for a claim in the new version of the FIDIC Red Book from the event giving rise to the claim till the time that it should be referred to the DAAB is 266 days⁷³ (except for a claim which has a continuing effect). However, despite this exhaustive procedure, there are still ways that the claiming party could seek to delay the determination by the engineer or the DAAB.

3.4 Types of Claims According to New Claims Procedure

⁷³ 28 days for the Notice of Claim, 84 days for the fully detailed claim, 84 days for the engineer's determination, 28 days for the First Notice of Dissatisfaction, 42 days to refer the dispute to the DAAB.

In the new edition of the FIDIC Red Book, the difference between the employer's claim (previously under Sub-Clause 2.5) and the contractor's claim (previously under Sub-Clause 20.1) has been eliminated, and both parties are now required to follow the claim procedure under Clause 20, which is called Employer's and Contractor's Claims. This indicates FIDIC's intention to deal with both parties even-handedly.⁷⁴

The claims are divided into two categories under the new Sub-Clause 20.1: Claims for Payment and Extension of Time and Other Claims.

3.4.1 Claims not for payment/EOT

Paragraph C of Sub-Clause 20.1 allows either party to request entitlement of any kind or relief against other party other than entitlement of payment or extension of time.

If the request has been disagreed with (or deemed to be disagreed with if there is no response within a reasonable time) by the other party, then the claiming party shall notify a claim to the engineer as soon as practicable after he/she becomes aware of the other party's disagreement. Then, the engineer shall make determination under Sub-Clause 3.7.

3.4.2 Payment/EOT claims

Most of the claims in construction projects are for payments and/or extension of time⁷⁵; these claims are addressed under Sub-Clause 20.2 in the new FIDIC Red Book. The claim

⁷⁴ Michael Grose and Others, 'FIDIC Red Book 2017 A MENA perspective' (2017) CLYDE&CO <<https://www.clydeco.com/insight/article/fidic-red-book-2017-a-mena-perspective>> accessed 20 October 2018

⁷⁵ Zisha Rizvi, 'FIDIC in the Middle East - The Must Know for Industry Players' <<https://www.lexology.com/library/detail.aspx?g=beeb6477-d429-4864-add4-57ea6f5c0197>> accessed 28 September 2018

procedure under Sub-Clause 20.2 is more prescriptive with regards to complexity and documentation requirements.

In case of a claim by either party, the claiming party shall notify the engineer of the claim within 28 days from the date the party becomes aware of the claim; by failing to do so, the party will lose entitlement to compensation.

As part of the claim management rigidity in the new edition, Sub-Clause 20.2.3 enforces a duty on the claiming party to keep contemporary records as may be required to substantiate the claim. However, the sub-clause allows the contractor's records to be monitored by the engineer (but not the employer's records) and to issue an instruction to keep additional records as required.⁷⁶

The claim procedure and related timeframes mentioned in Section 3.2.2 above shall be followed by the claiming party to avoid time lapse in any stage of the claim procedure. Accordingly, a fair determination shall be made by the engineer in accordance with Sub-Clause 3.7.

In case of any late claims for payment and/or extension of time, the new edition allows the claiming party to submit to the Dispute Avoidance/Adjudication Board (DAAB) for a waiver of time limits (for either claim notification or claim submission) within 14 days from the date of receiving a time lapse notice from the engineer⁷⁷. Then, the DAAB shall

⁷⁶ Peter Fogh, Niklas Korsgaard Christensen and Anne-Sophie Truelsen, 'New FIDIC Forms of Contract: Plesner Insight on the new FIDIC Red, Yellow and Silver Books' (2017) Plesner <
https://www.plesner.com/insights/articles/2017/12/revision-af-fidics-red-yellow-og-silver-book-2017?sc_lang=en>
accessed 31 October 2018

⁷⁷ Ibid

make determination within 28 days as to whether to grant the claiming party the time limit waiver in the relevant circumstances.

However, this right applies only if the party has received an engineer's notice for the time lapse within the specified timeframe; otherwise, the party will lose its entitlement to seek a waiver of the time limit.⁷⁸

3.5 Essential Elements for Successful Claims

This section explains the main elements of Sub-Clause 20.1 which the contractor needs to take care of in order to submit a successful claim.

a) Existence of the event or circumstance

When a party submits a claim due to an event or circumstance, this means the case already exists and will cause a delay or additional payment. This requires the claiming party not only to be familiar with the event or circumstance but also to consider when he/she should have become aware, which is more likely a cause of dispute between the parties. For example, the date the contractor becomes aware of his/her subcontractors' claims impacts when the contractor should submit his/her Notice of Claim.⁷⁹

b) The required Notice

⁷⁸ Ibid

⁷⁹ Andrew Burr, *Delay and Disruption in Construction Contracts* (5th edn, Informa Law from Routledge, Oxon, 2016) 115

The claiming party should be careful regarding the timeframe of the notice submission as the first step to any claim; this is due to the possibility of losing the entitlement for a claim if the notice is considered time barred. The notice is important because⁸⁰:

- All involved parties become aware of the existence of an event or circumstance which might entitle the claiming party additional payment or delay in the contract period.
- Then, appropriate records can be preserved to avoid any future argument.
- Other measures may be applied to reduce the effects.
- It may be possible to resolve the matter earlier.
- If the event or circumstance is considered to be of minor effect, then the formal claim procedure may not be required.

The claim notification shall satisfy some requirements in order to be considered a valid notice⁸¹:

- The notice must be in writing.
- The notice must define the event or circumstance.
- The notice must be submitted within 28 days from the date of the claiming party's become aware of the event or circumstance.
- It is not required to include the details of the claimed amount or time in the notice.

⁸⁰ Christopher R. Seppälä, 'Contractor's Claims Under The FIDIC Contracts For Major Works' (2005) *Construction Law Journal London*

⁸¹ Andy Hewitt, *Construction Claims and Responses: Effective Writing and Presentation* (2nd edn, Wiley Blackwell, UK 2016) 178

- The notice must be titled as “notice”.

c) Fully Detailed Claim

After the notice, the contractor shall submit a fully detailed claim within 84 days of the event or circumstance. The fully detailed claim must include the following measures⁸²:

- a. The details of the event or circumstance giving rise to the claim.
- b. The basis of the claim (contractual or other legal basis).
- c. All contemporary records which the claiming party depends.
- d. Detailed supporting particulars of the claim.
- e. Justification of the late submission of the Notice of Claim if the engineer considers it as late submission.

d) The Contemporary Records

The claiming party is under obligation to keep contemporary records which are required to substantiate the claim (“contemporaneous” means records made at the time of the event or circumstance giving rise to the claim or very close to it)⁸³. The contemporary records must be kept on site or in any place acceptable to the engineer to be available for inspection. However, the engineer can request that contractor provide additional records which seem to be required to substantiate the claim. However, it is the claiming party’s burden to prove

⁸² Nael G. Bunni, ‘A Comparative Analysis of the Claim & Dispute Resolution Provisions of FIDIC’s 1999 Major Forms of Contract Against its Earlier Forms’ (2006) 8

⁸³ Ruveyda Komurlu and David Arditi, ‘The Role of General Conditions relative to Claims and Disputes in Building Construction Contracts’ (2017) Vol. 4, No. 2 International Journal of Contemporary Architecture 29

his/her claim; therefore, the claiming party should consider exactly what contemporary records are required for his/her claim.⁸⁴

e) Monthly Updates

Monthly updates on the particulars of the claim must be provided by the claiming party if the event or circumstance giving rise to the claim has a continuing effect. In this case, the fully detailed claim submitted first will be considered as interim only.⁸⁵

f) Other Claim related provisions in the Contract

It is necessary for the claiming party to comply with any other provisions of the contract which apply to the claim. For example, if the claim is affected by an exceptional event, then the claiming party shall comply with Sub-Clause 18.2 and give notice of the exceptional event as required.

g) Failures of the claiming party

If the claiming party fails to:

- Submit claim notification within the stipulated timeframe.
- Submit the detailed claim within the specified timeframe.
- Keep the contemporary records.

⁸⁴ Euan Lloyd, 'New FIDIC 2017 Yellow Book – A New Claims Procedure' (2017) Al Tamimi & Co <<https://www.tamimi.com/law-update-articles/new-fidic-2017-yellow-book-a-new-claims-procedure/>> accessed 16 November 2018

⁸⁵ Nael G. Bunni, 'A Comparative Analysis of the Claim & Dispute Resolution Provisions of FIDIC's 1999 Major Forms of Contract Against its Earlier Forms' (2006) 9

- Provide monthly updates of the particulars of a claim under the continuing effect of the event or circumstance.
- Comply with other provisions under the contract which apply to the claim.

Then, the engineer can take into account during claim determination the level to which this failure prevented appropriate examination of the claim.⁸⁶

h) Response time to a Claim

Discussion and negotiations between the parties shall take place and be encouraged by the engineer within 42 days following the submission of the fully detailed claim. In case no agreement is reached within the first 42 days, then the engineer shall make fair determination of the claim within further 42 days and notify both parties of his/her determination. If the engineer fails to issue his/her determination at the end of this period, then the claim is considered as rejected by the engineer.⁸⁷

The engineer may seek the parties' approval to extend the time required to complete his/her determination if he/she feels the stipulated 42 days to make a fair determination are not sufficient.⁸⁸ The purpose of this is to prevent the engineer from unreasonably delaying the evaluation and response to a claim or asking for unnecessary further particulars.

⁸⁶ Ibid 13

⁸⁷ Euan Lloyd, 'New FIDIC 2017 Yellow Book – A New Claims Procedure' (2017) Al Tamimi & Co <<https://www.tamimi.com/law-update-articles/new-fidic-2017-yellow-book-a-new-claims-procedure/>> accessed 16 November 2018

⁸⁸ Nael G. Bunni, 'A Comparative Analysis of the Claim & Dispute Resolution Provisions of FIDIC's 1999 Major Forms of Contract Against its Earlier Forms' (2006) 9

3.6 Other Considerations for the new Claim Procedure

3.6.1 Disagreement with the Engineer's Determination

If the engineer's determination has been objected to by either party, then the disagreeing party is entitled to issue a Notice of Dissatisfaction (NOD) within 28 days from the date of the engineer's determination; the NOD must set out the reasons for disagreement.⁸⁹

The dispute resolution procedure under Clause 21 shall be followed for the disputed claim. However, the engineer's determination shall remain binding on both parties until the process of dispute resolution starts.

The dispute shall be referred to the DAAB as a formal procedure. The DAAB may consist of one or three members, there are no particular procedural rules regarding the DAAB in the new revision of the FIDIC Red Book; however, Clause 21 requires the DAAB to give its decision within 84 days from the date of the dispute.⁹⁰

If either party disagrees with the DAAB's decision, then a Notice of Dissatisfaction shall be raised, and parties will have a further 28 days to settle the dispute amicably; otherwise, the dispute shall be raised to arbitration. In case no DAAB is in place, the dispute shall be raised directly to arbitration.⁹¹

⁸⁹ Peter Fogh, Niklas Korsgaard Christensen and Anne-Sophie Truelsen, 'New FIDIC Forms of Contract: Plesner Insight on the new FIDIC Red, Yellow and Silver Books' (2017) Plesner <
https://www.plesner.com/insights/articles/2017/12/revision-af-fidics-red-yellow-og-silver-book-2017?sc_lang=en>
accessed 31 October 2018

⁹⁰ Eugenio Zoppis, 'DAAB and Dispute Resolution Under the 2017 FIDIC Forms of Contract' (2018) King's College, London

⁹¹ Ibid

Similar to the previous revision, the new revision uses the International Chamber of Commerce (ICC) Rules of Arbitration as the default arbitral rules, and the arbitration Tribunal has full power to revise the engineer's and the DAAB's determinations as required.

3.6.2 The Notice

The claim procedure in the new revision has been written precisely which the claiming party must follow when submitting a claim – either for additional cost or extension of time, it is the claiming parties duty to proof his/her entitlement of the claim, and the engineer duties to evaluate the submitted proof and decide the entitlement of the claiming party on his/her claim.

The first step for a successful claim is the Notice of Claim, which must be submitted within 28 days of the claiming party become aware of the evidence or circumstance giving rise to the claim, the importance of this notice is⁹²:

- All involved parties become aware of the evidence or circumstance which will cause additional payment or extension of time to the contract.
- Either party can keep proper record to avoid future arguments.
- The other party may take alternative measures to reduce the effect of the events.
- The matter might be resolved earlier.

⁹² Christopher R. Seppälä, 'Contractor's Claims Under The FIDIC Contracts For Major Works' (2005) Construction Law Journal London

- If the effect of the event or circumstance is not considered as significant, then the following action may not require following the formal claim procedure if agreed by the parties.

The notice must contain such basic details as⁹³:

- It shall define the event or circumstance.
- It shall be in writing and properly delivered to the concern parties.
- The time or amount claimed or basis of the claim is not necessary to be mentioned in the notice.
- Simple acknowledgement from the other party and the engineer will be sufficient to comply with the procedure (i.e., no response is required).

One of the cases in which the unavailability of a Notice of Claim played a significant rule in losing entitlement to the claim was recently decided by the Privy Council in *NH International (Caribbean) Limited v. National Insurance Property Development Company Limited*. The summary of the relevant facts of the case is as follows⁹⁴:

- The contractor and the employer entered a FIDIC-based contract (the FIDIC Red Book) on 6 March 2003 for construction of a hospital in Tobago.
- The project started in the same month for duration of 2 years (i.e., completion date in March 2005).

⁹³ Andy Hewitt, *Construction Claims and Responses: Effective Writing and Presentation* (2nd edn, Wiley Blackwell, UK 2016) 178

⁹⁴ Philip Van Rensburg, 'Employers' claims under FIDIC contracts' (2016) Hogan Lovells <<https://www.hoganlovells.com/en/publications/employers-claims-under-fidic-contracts>> accessed 10 October 2018

- The work was suspended by the contractor on 23 September 2005 and terminated on 3 November 2006.
- Several disputes arose between the parties and were referred to arbitration. The contractor has claimed damages as a result of the determination of the contract; on the other hand, the employer has submitted counterclaims during the arbitration proceedings.
- The contractor became aware of the counterclaims only during the arbitration proceedings, given that the employer had failed to submit Notice of Claims at any stage while performing the contract.

The contractor's arguments were rejected by the arbitrator, who held that "clear words are required to exclude common law rights of set-off and/or abatement of legitimate cross-claims" and the notices were not required for the employer's counterclaims during the arbitration proceedings.

The High Court as well as the Court of Appeal agreed with the arbitrator's decision in this regard. However, this decision was overruled by the Privy Council, who found that according to the contract's Sub-Clause 2.5, notice is required for any claims which the employer wishes to raise.

3.6.3 Advance Warning

The new advance warning concept in the new edition of the FIDIC Red Book is an industry standard that is found in other forms of standard contracts such as NEC; it is consistent with acting in good faith.⁹⁵

This mechanism requires either party to notify the engineer of any known (or probable) circumstance which may affect the works adversely, delay the execution of the works, or increase the contract price.

As part of the engineer's duties in the new revision to encourage dispute avoidance, he/she may instruct the contractor (upon receiving an advance warning) to propose a plan to mitigate or avoid the effects of the event in question. This instruction may give rise to a variation.⁹⁶

3.6.4 Determining the Claims

Similar to the new claim procedure in the new version of the Red Book, the engineer's rules have significantly expanded with regard to claim determination and resolving disputes by encouraging more collaboration between the parties.

Whenever the engineer is required to make determination for claims or any other matters, he/she is under obligation to consult with both parties and encourage them to reach an

⁹⁵ Euan Lloyd, 'New FIDIC 2017 Yellow Book – A New Claims Procedure' (2017) Al Tamimi & Co <<https://www.tamimi.com/law-update-articles/new-fidic-2017-yellow-book-a-new-claims-procedure/>> accessed 16 November 2018

⁹⁶ Ibid

agreement within 42 days. If the parties do not reach an agreement within the 42 days, then the engineer has to make a “fair” determination on the claim within further 42 days. However, the claim will be deemed to be rejected if the engineer fails to make a determination within the 42 days.

Sub-Clause 3.7 now deals with the engineer’s determinations, as opposed to Sub-Clause 3.5 in the previous revision. This sub-clause contains new features and is more detailed compare to Sub-Clause 3.5 in the previous revision.

Some of the new features in Sub-Clause 3.7 are summarized as follows⁹⁷:

- The engineer must act neutrally; although the term “neutrally” has not been defined, it can undoubtedly be considered as meaning that the engineer must act impartially. Sub-Clause 3.2 emphasises this interpretation by requiring the engineer to issue his/her determination without reference to the employer.
- The parties are encouraged to settle the matter or claim amicably within 42 days, and the engineer plays a greater role in achieving this.
- Unlike Sub-Clause 3.5 in the previous revision, the new Sub-Clause 3.7 expressly refers to the engineer consulting with both parties “jointly” and requires him/her to encourage discussion to reach an agreement on the matter or claim. This greater

⁹⁷ Niav O’Higgins, Karen Killoran and Niamh McGovern, ‘Updated FIDIC Contracts 2017: What has Changed?’ (2018) Arthur Cox <<http://www.arthurcox.com/publications/updated-fidic-contracts-2017-changed/>> accessed 15 July 2018

involvement from the engineer is to prevent the matter or claim from developing into a dispute.

As with the previous revision, the engineer's determination is binding on both parties unless a Notice of Dissatisfaction is issued by either party with 28 days after issuing the determination.

3.7 Claims under the FIDIC Red Book in view of the UAE Civil Code

Even though the new revision of the FIDIC Red Book has filled in the gaps in the previous revision with regard to the claims procedure and the dispute resolution mechanism, which certainly will reduce the number of disputes if the parties comply with these procedures, the contract's clauses shall be read in conjunction with the applicable law, which usually imposes certain rights and obligations on both parties. In the UAE, the UAE Civil Code is the applicable code for the construction industry.

To ensure entitlement to a claim, the claiming party must adhere to the contract's clauses as well as the UAE Civil Code procedure pertaining to claims and their requirements.

For instance, the FIDIC Red Book provides that if the claiming party fails to give claim notification on time, he/she loses his/her entitlement to the claim. Although the UAE Civil Code respects the contract terms and conditions when dealing with any contractual-related matter⁹⁸, there are articles which may have influence on the matter and may change the

⁹⁸ Michael Grose and Others, 'FIDIC Red Book 2017 A MENA perspective' (2017) CLYDE&CO < <https://www.clydeco.com/insight/article/fidic-red-book-2017-a-mena-perspective>> accessed 29 July 2018

decision on the dispute. For example, in the Civil Code, the parties should not exercise their contractual rights in an oppressive or abusive manner toward each other, as stated in Article 106; thus if the claim is rejected only for the reason of notification or its time, this may be considered unlawful, especially if the related financial harm to the claiming party is disproportionate to the other party's right to receive notification in a timely manner.⁹⁹

Moreover, under the UAE Civil Code, unjust enrichment is unlawful, as stated in Articles 318 and 319. For example, if the contractor claims additional payment for varied works and the claim is rejected due to noncompliance with the notification time limit, then the law may consider that the employer has been unjustly enriched, as he/she has benefited from additional works without related payment due to a procedural technicality only; therefore, the claim may succeed on account of the UAE law.¹⁰⁰

However, it is recommended that the parties adhere to the notification requirements and time limits specified in the contract to avoid having a complex legal argument before the court or the Arbitral Tribunal to justify the lack of compliance with the contractual requirements and consequently potentially losing their entitlement to claim. Also, the other provisions of the applicable law shall be considered by the contracting party to avoid conflict between the contract's clauses and the applicable legal provisions.

⁹⁹ Jeremy Glover, 'Sub-Clause 20.1 – the FIDIC Time Bar under Common and Civil Law' (2015) Fenwick Elliott <<https://www.fenwickelliott.com/research-insight/articles-papers/contract-issues/sub-clause-fidic-time-bar>> accessed 31 August 2018

¹⁰⁰ Ibid

CHAPTER FOUR

THE DISPUTE AVOIDANCE/ADJUDICATION BOARD (DAAB)

4.1 Introduction

The new FIDIC Red Book has a number of key changes to the dispute board to encourage dispute avoidance between the parties, such as splitting the Claim Clauses from the Dispute Clauses and sharpening the role of the dispute board. Also, the more detailed notice requirements and time bar provisions with regard to the claims and dispute will definitely increase the administrative burden on the parties as well as the engineer. The claims procedure has been unified for both the contractor and the employer.

Although the framework for dispute resolution in the new FIDIC Red Book has remained similar to that in FIDIC 1999, there are significant changes in the new revision which encourage dispute avoidance, including the following¹⁰¹:

1. Claim and Dispute Clauses are split into separate clauses to emphasise that a claim does not necessary lead to a dispute. Claims are dealt with under Clause 20, and the dispute resolution under Clause 21.
2. The contractor's and the employer's claims should follow the same rules and are managed by the same clause (Clause 20), while in the previous revision, they were

¹⁰¹ Stephenson Harwood, 'Dispute resolution under FIDIC 2017' (2018) <<http://www.shlegal.com/insights/dispute-resolution-under-fidic-2017>> accessed 12 October 2018

dealt with under different sub-clauses (Sub-Clause 2.5 for the employer's claim and Sub-Clause 20.1 for the contractor's claim).

3. The new Sub-Clause 8.4, which provides related to the early warning system that each party shall advise in advance the other party of any probable or known event or circumstance which may affect the progress of the work or the contract price.
4. Under the new Sub-Clause 1.3, the parties are required to identify any notice (including Notice of Claim) as a "notice", which aims to avoid dispute between the parties as to whether a notice has been given to the other party or not.

There is common approach among FIDIC users of deleting the DB provisions in their contracts, ignoring (or underemphasising) the importance of the Dispute Boards. This is due to several perceptions¹⁰²:

- The DB cost is an extra expense which can be avoided.
- The consultant is paid to do this job
- From the employer's point of view, any early binding decision regarding a dispute will miss the negotiation advantage, as contractors usually try to avoid extra cost and time by taking the dispute to arbitration.
- It is difficult to recover any amount from a foreign contractor if the decision is reversed by arbitration.

¹⁰² Mark Goodrich, 'Dispute Adjudication Board: Are they the future of dispute resolution?' (2016) white & Case <<https://www.whitecase.com/publications/article/dispute-adjudication-boards-are-they-future-dispute-resolution>> accessed 3 October 2018

However, the dispute adjudication board system has considerable proven success where it has been applied in the market, especially in large projects¹⁰³. The existence of a Dispute Board will likely prevent disagreements between the parties from developing into disputes by informal intervention during regular site visits.

4.2 Definition of the Dispute

There are various definitions of a dispute. In FIDIC, a dispute is defined as¹⁰⁴ “*any situation where one Party makes a claim against the other Party (which may be a Claim, or a matter to be determined by the Engineer, or otherwise); (b) the other Party (or the Engineer under Sub-Clause 3.7.2) rejects the claim in whole or in part; and (c) the first Party does not acquiesce (by giving a NOD under Sub-Clause 3.7.5 or otherwise), provided however that a failure by the other Party (or the Engineer) to oppose or respond to the claim, in whole or in part, may constitute a rejection if, in the circumstances, the DAAB or the arbitrator(s), as the case may be, deem it reasonable for it to do so.*” In other words any claim that has been rejected by the other party and the rejection is not acceptable to the first party who made the original claim¹⁰⁵.

4.3 Reasons behind Disputes

When parties enter a construction contract, they always intend to avoid disputes, and if one happens for any reason, they think it can be solved amicably. Unfortunately, most likely,

¹⁰³ Ibid

¹⁰⁴ The 2017 FIDIC Red Book Sub-Clause 1.1 [Definitions] 1.1.29

¹⁰⁵ Simon Tolson, Jeremy Glover and Stacy Sinclair S, *Dictionary of Construction Terms* (1st edn, Informa Law Routledge, Oxon 2012) 53

the case will be the other way around, and the parties must face some unavoidable disputes. The logical question here is, if both parties intend to avoid disputes, why do disputes still arise? There are different reasons for disputes between the parties, which are summarized as follows¹⁰⁶:

- Poor contract administration.
- Poorly drafted contract terms, especially the ones related to claims or dispute resolution.
- Misunderstanding the contract's terms and conditions.
- Incomplete design or insufficient employer requirements.
- Not a suitable contract for the procurement method.
- Parties' failure to perform their contract obligations.
- Unrealistic contract period and time scale.
- Unfair risk allocation in the contract.
- Improper site instructions.
- Poor communication structure.

4.4 Evolution of Dispute Resolution

The method of dispute resolution under FIDIC contracts has developed from recourse to arbitration directly after the engineer's determination, through a dispute board that could give recommendations, to the Dispute Adjudication Board in the 1999 edition of the FIDIC

¹⁰⁶ Sai On Cheung, *Construction Dispute Research Conception, Avoidance and Resolution* (1st edn, Springer, Switzerland 2014) 78

Red Book, which, in the 2017 edition, was developed to include a dispute avoidance role and is now called the Dispute Avoidance/Resolution Board (DAAB).

4.4.1 Dispute Resolution under FIDIC Red Book before 1999

Two stages to resolve a dispute were introduced at the first issue of FIDIC contracts in 1957, which allowed the parties to go for arbitration at the end of the project, giving the engineer the lead in contractual matters; this was developed to a possibility to approach arbitration before completion of the project¹⁰⁷.

Later, under the 1987 edition, the engineer had to make his/her decision on any matter within 84 days from the date of the referral; the engineer should be impartial when making his/her decision and the decision should take immediate effect by the parties unless reversed by amicable settlement or arbitration. Then, if neither party expressed dissatisfaction with the engineer's decision, the decision became final and binding. If either party was dissatisfied with the engineer's decision, he/she should refer the matter to arbitration. There was a period of 56 days before commencement of the arbitration to allow the parties to reach an amicable settlement on the disputed matter. If no settlement was reached or even attempted, then the dispute should be finally decided by arbitration.¹⁰⁸

A three-tiered dispute resolution procedure to include a dispute adjudication board giving a binding decision appeared for the first time in the Orange Book (Design-Build and

¹⁰⁷ Eugenio Zoppis, 'DAAB and Dispute Resolution Under the 2017 FIDIC Forms of Contract' (2018) King's College, London

¹⁰⁸ Ibid

Turnkey) in 1995. However, in the same year, the World Bank Standard Bidding Conditions mandated that parties include a Dispute Review Board (DRB) in their contracts. The main role of the board was to review and make recommendation about the disputed matter; if no objection was made to the DRB's recommendation, then it became binding on both parties. This initiative was the turning point for FIDIC to adopt a Dispute Board in the supplement to its Red and Yellow Books in 1996.¹⁰⁹

4.4.2 Dispute Resolution under 1999 FIDIC Red Book

In FIDIC's Red Book 1999, claims, disputes, and arbitration are regulated in Clause 20; the contractor must give notice for any claim for additional payment or extension of time and must keep all contemporary records, detailed particulars shall be submitted within 42 days. However, notice is not required for all claims under this version of the FIDIC Red Book. For example, Sub-Clause 13.3 does not require the contractor to submit a notice if he/she receives an instruction from the engineer. The engineer shall approve, disapprove, or comment on the claim within 42 days.¹¹⁰ However, there is no time limit for the engineer to issue his/her determination; it is only not to be unreasonably withheld or delayed.¹¹¹

The claim procedure for the employer is less procedural than that for the contractor's claim¹¹²; the employer is required to give notice with particulars as soon as practical after

¹⁰⁹ Ibid

¹¹⁰ Nael G. Bunni, 'A Comparative Analysis of the Claim & Dispute Resolution Provisions of FIDIC's 1999 Major Forms of Contract Against its Earlier Forms' (2006)

¹¹¹ Ibid

¹¹² Philip Van Rensburg, 'Employers' claims under FIDIC contracts' (2016) Hogan Lovells <<https://www.hoganlovells.com/en/publications/employers-claims-under-fidic-contracts>> accessed 5 September 2018

he/she becomes aware of the matter giving rise to the claim; then, the engineer shall proceed with his/her determination.

The engineer's obligation to act impartially under the 1999 FIDIC Red Book has been defined as making a fair determination for any claim. However, the engineer is required to consult with both parties to reach an amicable settlement without obligation to make positive effort and without a duty to act neutrally during this process; this arguably considers the engineer as the employer's personnel.¹¹³ Then the engineer's determination becomes binding on both parties unless revised in further procedure under Clause 20.

The DAB in the 1999 FIDIC Red Book can give advice or opinion if requested by either party; however, this advice or opinion is not binding. According to Bunni¹¹⁴, "*by providing its opinion on the matter in contention or on the disagreement the Dispute Adjudication Board may throw a revealing light on the rights and obligations of the parties and thus prevent a matter from becoming a dispute*".

Nevertheless, a binding DAB decision can be obtained if either party refers the dispute to the DAB, which shall give its decision within 84 days from the referral. Either party may give dissatisfaction notification within 28 days as a condition precedent to proceeding with arbitration; if no such notice is given, then the DAB decision becomes final and binding.¹¹⁵

¹¹³ Eugenio Zoppis, 'DAAB and Dispute Resolution Under the 2017 FIDIC Forms of Contract' (2018) King's College, London

¹¹⁴ Nael G. Bunni, 'A Comparative Analysis of the Claim & Dispute Resolution Provisions of FIDIC's 1999 Major Forms of Contract Against its Earlier Forms' (2006)

¹¹⁵ Gwyn Owen, 'The Working of the Dispute Adjudication Board (DAB) under New FIDIC 1999 (New Red Book)' (2003)

The activation of this provision is subject to the claim evolving in a dispute. Although the dispute is not defined in this version, the definition may be sought from the applicable law.

The referral to arbitration is subject to parties' attempting to settle the dispute amicably 56 days prior to referral to arbitration. However, if the DAB's decision is not complied with by either party, then the dispute may be directly referred to arbitration. Also, if there is no DAB in place, the parties can refer any dispute directly to arbitration, which gives a path to resolving a dispute if one party is frustrating the DAB appointment.¹¹⁶

Under the Yellow and Silver Books of the 1999 edition, the DAB is appointed on an "ad-hoc" basis, unlike in the Red Book, in which the DAB is appointed on a "standing" basis. The weakness of using "ad-hoc" is that the DAB has no proactive role to prevent a dispute, since it is called only if a claim has already become a dispute. Also, parties can make it difficult to appoint DAB members as a tactical interest to delay the DAB's decision on a dispute.

4.4.3 Dispute Resolution under The 2017 FIDIC Red Book

As highlighted in Chapter Two, The 2017 FIDIC Red Book (in addition to the rest of the new FIDIC suite) has addressed many shortfalls from the previous revisions, such as the programming requirements, extension of time, advance warning, new variation procedure, enhancement of the engineer's rules and duties, risk allocation, and of course the dispute resolution procedure, which includes the role of encouraging dispute avoidance.

¹¹⁶ Ibid

In The 2017 FIDIC Red Book, the dispute resolution clause has been split into two clauses, separating the claims procedure from the dispute procedure. Clause 20 now deals with both parties' claims, and Clause 21 deals with dispute resolution.

For better clarity and to avoid interpretation of the claim or the dispute under the applicable law or other means of interpretation, the new revision provides a specific definition of the claim as¹¹⁷ “*a request or assertion by one Party to the other Party for an entitlement or relief (...) in connection with, or arising out of, the Contract or the execution of the Works*”, and the dispute as¹¹⁸ “*means any situation where:*

“(a) *One Party makes a claim against the other Party [...]*

“(b) *The other Party (or the Engineer [...]) rejects the claim [...];*

“(c) *The first Party does not acquiesce (by giving a NOD) [...]*”

Clause 20 now deals with both the contractor's claims and the employer's claims with the same procedure, unlike the previous revisions. This shows a neutral stance between the contracting parties. Also, the clause uses a party-neutral term, “the claiming party”, to emphasise the neutrality between the parties.

Three cases are described as reasons for making a claim¹¹⁹: if the either party considers him/herself entitled to additional payment or extension of time (extension of DNP period) from the other party or other entitlement or relief against the other party. The claiming

¹¹⁷ The 2017 FIDIC Red Book Sub-Clause 1.1 [*Definitions*] 1.1.16

¹¹⁸ The 2017 FIDIC Red Book Sub-Clause 1.1 [*Definitions*] 1.1.29

¹¹⁹ Stephenson Harwood, ‘Dispute resolution under FIDIC 2017’ (2018) <<http://www.shlegal.com/insights/dispute-resolution-under-fidic-2017>> accessed 12 October 2018

party shall submit the Notification of Claim within 28 days from the date of awareness of the event that causes the claim, and the engineer shall respond within 14 days whether the notification was given on time or not; otherwise, the notification is considered valid.

Following the Notification of Claim, the claiming party shall submit a fully detailed claim with particulars within 84 days; however, for the first time, FIDIC has specified that if the claim has a continuing effect, then the fully detailed claim submission is interim and shall be followed by monthly detailed submissions; the final fully detailed submission shall be made within 28 days after the continuing effect ceases its effect.

Upon receiving the fully detailed claim, the engineer shall carry on with the assessment of the claim by firstly consulting both parties and encouraging them to reach a binding agreement within 42 days. If no agreement is reached, then the engineer shall make a fair and neutral determination within 42 days; otherwise, the claim is deemed to be rejected.

Notification of Dissatisfaction (NOD) shall be submitted by the dissatisfied party within 28 days; otherwise, the engineer's determination becomes final and binding. After the NOD is given, the dispute may be referred to the DAAB.

The dispute shall be referred to the DAAB within 42 days from the date of the NOD; otherwise, the NOD expires, and the engineer's determination becomes final and binding. DAAB shall make a decision on the dispute within 84 days from the date of referral; its decision is binding and final (unless referred to arbitration), and any amount included in the DAAB's decision shall be payable without further certificate or notice.

Alternatively, the DAAB may be jointly requested to provide an informal opinion or advice on a disputed matter, as this will assist the parties in dispute avoidance. Even though this advice is not binding on either party or the DAAB, this task can't be initiated if the claim is under the engineer's determination.¹²⁰

If either party is dissatisfied with the DAAB's decision, then he/she shall give a NOD within 28 days of issuance of the DAAB's decision; otherwise, the DAAB's decision becomes final and binding.

If any decision is not given effect promptly, then the parties can refer the dispute to arbitration. Also, if there is no DAAB in place for any reason, the parties may refer the dispute directly to arbitration.¹²¹

If the NOD on a DAAB's decision has been issued on time, a mandatory 28 days shall be allowed for the parties to resolve the dispute amicably prior to referring the dispute to arbitration. Once the dispute has been referred to arbitration (i.e., all above procedure's steps have been followed on time), then the Arbitral Tribunal shall have full power to review and open up the DAAB's decision as well as the engineer's determination on the disputed matter as long as they are not final and binding.

4.5 DAAB Roles and Duties

The Dispute Avoidance/Adjudication Board is a neutral and independent panel who give a decision on any dispute that may arise between the parties; the decision can take the form

¹²⁰ Ibid

¹²¹ Ibid

of an opinion or advice if it is requested by either party for any matter related to the contract, or the form of an award in case of an official dispute submitted by either party. In order to do so, the DAAB shall¹²²:

- Periodically visit the site and become aware of the project's details and progress.
- Stay updated with all activities and progress and any problems at the site.
- Encourage dispute avoidance and amicable dispute resolution.
- Conduct official dispute resolution procedure (including hearings, evidence review, and issuing a decision) in a professional manner.

Usually, the DAAB meets on site every 3 months to familiarise itself with the actual work progress and any problems and potential claims; the DAAB shall prepare and communicate with the parties a short report after each visit highlighting their activities during the site visit.¹²³

The existence of the DAAB in the project promotes mutual agreement between parties on any matter that potentially raises a dispute. Experience shows that the Dispute Board facilitates trust and cooperation between the parties, open communications, and positive relationships; the main reason behind that is that the disputes are handled on individual basis, which minimizes the accumulation of unresolved claims, which usually create an acrimonious atmosphere.

¹²² Gwyn Owen and Brian Totterdill, *Dispute boards: procedures and practice* (1st edn, Thomas Telford 2008)

¹²³ John Redmond, *Adjudication in Construction Contracts* (1st edn, Blackwell Science, Oxford 2001)

The Dispute Board usually issues a binding decision, which is normally made by unanimous consensus of the board members.¹²⁴

4.6 DAAB Pros and Cons

There are several methods for dispute resolution in the construction industry, each of which has advantages and disadvantages. Parties choose which method to use in their contract accordingly. In this section, a summary of the DAAB's advantages and disadvantages will be highlighted.

4.6.1 DAAB's Advantages¹²⁵

- The DAAB members become part of the team, which allows them to be aware of all problems during the project.
- The DAAB members usually have a considerable level of construction knowledge, which makes the DAAB's decision more accurate.
- The periodic site visits allow the DAAB members to be aware of the project's progress and anticipate any disputes or issues.
- The DAAB's existence prevents claims or matters from becoming disputes.
- The DAAB deals with each claim individually, which prevents claims from being cumulative.

¹²⁴ Gwyn Owen and Brian Totterdill, '*Dispute boards: procedures and practice*' (1st edn, Thomas Telford 2008)

¹²⁵ Edward Corbett, 'Moment of decision? The future of dispute boards under the FIDIC forms and beyond' (2009) *Construction Law International* Volume 4 No 3

- The DAAB's decision must be given with 84 days, which is a relatively short period.
- The DAAB can give opinions on any matter if requested by the parties.
- Compared to other dispute resolution methods, the DAAB is cheaper.
- The DAAB is impartial and independent, which makes its decision more acceptable to the parties.
- The DAAB has a duty to encourage dispute avoidance between the parties.
- The DAAB provides a form of "insurance" for the parties to resolve any dispute that may arise or prevent a dispute from arising.
- The DAAB's decision is binding on both parties and becomes final if no NOD is issued within 28 days from the date of receiving the DAAB's decision.

4.6.2 DAAB's Disadvantages¹²⁶

- The DAAB adds to the project's cost.
- The enforcement of the DAAB's decision is not at the same level of enforcement as arbitration awards or court judgments.
- The DAAB's decision is not final unless no NOD has been submitted by either party.

¹²⁶ John Redmond, *Adjudication in Construction Contracts* (1st edn, Blackwell Science, Oxford 2001)

4.6.3 Cost of the DAAB

The cost of the DAAB is normally divided between both parties; however, the historical data show that the average cost of the Dispute Boards within a contract does not exceed 1% of the total contract value, with less than 2% of DAAB decisions being referred to further arbitration or litigation.¹²⁷ This is a very strong indication to consider a DAAB as cost-effective process for dispute resolution.

4.7 Composition of the DAAB

Similar to the previous revision, the new FIDIC Red Book requires that parties jointly appoint the DAAB members within 28 days after receiving the Letter of Acceptance by the contractor unless otherwise stated.

The DAAB shall comprise one or three suitably qualified members (three members is the default number if not stated in the Contract Data); each party shall select one member with the agreement of the other party, then both members, after discussion with both parties, shall select the third member, who acts as chairman of the panel.¹²⁸

4.7.1 Selection of DAAB Members

Since the DAAB's decision shall be binding on both parties unless it is revised in further amicable settlement or arbitration, it is wise for the parties to select the members very

¹²⁷ Edward Corbett, 'Moment of decision? The future of dispute boards under the FIDIC forms and beyond' (2009) Construction Law International Volume 4 No 3

¹²⁸ Gwyn Owen and Brian Totterdill, '*Dispute boards: procedures and practice*' (1st edn, Thomas Telford 2008)

carefully. Each of the DAAB members must be a totally independent, qualified person with the ability to act impartially to make a unanimous decision with the DAAB panel.¹²⁹

For small contracts, it is reasonable to have a sole member in the DAAB; similarly, the number of members can be increased for megaprojects. However, if the project contains several contractors, or many layers of subcontractors, or several supplier agreements, or nominated subcontractors, it is preferable to have a common DAAB panel or “Interlocking” DAAB members who join different boards within the same project in order to have a more efficient DAAB.¹³⁰

As stated above, each party suggests one potential member of the DAAB. Usually, the tender documents contain a list of potential DAAB members; the tenderer can add further names, which become the tenderer’s suggestions, and the tender may become conditional. If possible, the list of potential names should be prepared jointly by both parties, who may agree on the nomination of the members after the tender submission but before the commencement date.¹³¹

In case of failure to agree on nominations of DAAB members, then the appointment entity¹³² shall appoint the DAAB members upon request from either party and after consultation with both parties; this appointment shall be final and conclusive.

¹²⁹ Ibid

¹³⁰ Ibid

¹³¹ Jeremy Glover, ‘FIDIC Dispute Adjudication Boards’ (2015) Fenwick Elliott <<https://www.fenwickelliott.com/research-insight/articles-papers/contract-issues/fidic-dispute-adjudication-boards>> accessed 4 November 2018

¹³² Ibid

The following conditions are considered as failure to appoint the DAAB members¹³³:

- a. If the parties fail to agree on the sole member within 28 days after the letter of acceptance or as otherwise stated in the contract.
- b. In case of a three-member DAAB, if either party fails to select a member or disagrees with the other party's member, or the parties fail to select the chairman of the DAAB within the time limit specified in the contract.
- c. If the sole member or one of the three members (as the case may be) declines or is unable to act as a DAAB member, and the parties fail to select a replacement within 42 days of vacancy.
- d. If either party refuses to sign the DAAB agreement (after completing the selection process) within 14 days from the date of the other party's request.

4.7.2 Qualities of DAAB Members

The parties delegate to the DAAB members the power to make decisions which affect the project and the parties, and it is normally not easy to remove one member, except if there is consent between both parties. Therefore, it is necessary to ensure that the DAAB members have the required experience and ability to wield these powers wisely and effectively.

¹³³ JICA, '*Dispute Board Manual*' (1st edn Japan International Cooperation Agency 2012)

4.7.2.1 Experience

It is essential that the DAAB member have a level of experience of the discipline that is relevant to the dispute, so he/she will be better understanding the problems that faced during the execution of the works, and the level of skills required to work in a professional manner, which will allow him/her to give reasonable solutions and make better decisions.

Although the construction methods differ in each project and each country, having knowledge of standard construction methods is an advantage to the DAAB members. It is a great benefit to the parties seeking advice or an opinion from an experienced board that has good knowledge of the industry practices.¹³⁴

However, it is impossible for all members to have knowledge of all up-to-date construction developments, so the parties shall make sure that the members are well briefed on the project and become familiar with all aspects of the project to be able to address any knowledge or experience gaps at an early stage.

4.7.2.2 Contractual Knowledge

It is significant for the DAAB members to have adequate knowledge of the parties' rights, liabilities, and obligations in the project. Normally, DAABs are used in large projects, in which the contract documentation is voluminous and contains the general and particular conditions, drawings, specifications, etc. The interpretation of such huge documents

¹³⁴ Gwyn Owen and Brian Totterdill, *'Dispute boards: procedures and practice'* (1st edn, Thomas Telford 2008)

allocating the risks between the parties requires a considerable level of knowledge and skills to allow the DAAB members to issue the fairest decision accordingly.¹³⁵

4.7.2.3 Language Competence

It is required that the DAAB members have a working knowledge of the contract's language (which may be defined in the appendix to tender) to be able to understand and interpret the contract documents professionally.

There are some cases where parties may communicate during the course of the project with a common language other than the contract language; in this case, it is advantageous to the DAAB member to have knowledge of the second language to remain fully conversant with all work activities.¹³⁶

On the other hand, being fluent in a language other than that of the contract documents may be considered as a disadvantage to the DAAB member if only one party can communicate by using this other language, especially if a communication happens between the DAAB member and one party using the language other than the contract's language, which the other parties do not understand. In this case, the DAAB member may be considered to be compromising his/her independence.¹³⁷

¹³⁵ JICA, *'Dispute Board Manual'* (1st edn Japan International Cooperation Agency 2012)

¹³⁶ John Redmond, *Adjudication in Construction Contracts* (1st edn, Blackwell Science, Oxford 2001)

¹³⁷ Edward Corbett, 'Moment of decision? The future of dispute boards under the FIDIC forms and beyond' (2009) *Construction Law International* Volume 4 No 3

4.7.2.4 Dispute Resolution Experience

The dispute resolution mechanism requires special techniques and understanding, which are normally not provided during the course of construction. The DAAB members' having this special knowledge and experience gives confidence to the parties that the decisions they reach consider all matters raised by the parties along with their contractual obligations; this will satisfy the parties, so they will voluntarily comply with the DAAB's decision, thereby reducing further submission to arbitration.

4.7.2.5 Different Procedural Knowledge

The fact that each project and each problem is unique (even if similar issues have been encountered elsewhere) makes different situations lead to differences of opinion. Therefore, it is essential that DAAB members be familiar with different problem-solving procedures and methods.

Even though the DAA procedure is specified within the FIDIC Contracts, this procedure may not be suitable for some cases, which may require the DAAB members to deviate from it in order to reach to an efficient, correct, and fair decision in a timely and cost-efficient manner.¹³⁸ This depends on the level of confidence that parties have in the DAAB members to adopt a flexible approach when a unique situation arises.

¹³⁸ JICA, *'Dispute Board Manual'* (1st edn Japan International Cooperation Agency 2012)

It is the DAAB chairman's responsibility to make sure the adopted procedure for a particular situation provides both parties equitable chances to present their cases and fair opportunities to prepare for and respond to the other party's case.¹³⁹

4.7.2.6 Impartiality

Impartiality is a fundamental requirement for the DAAB's decision. Bias toward one party will definitely give the other party a simple, direct ground to challenge the DAAB's decision and will affect the reputation of the biased DAAB members. DAAB members must be impartial as long as the DAAB is inboard. The members should not have prior knowledge of any kind of the subject matter of the dispute, as this may affect their decision if their knowledge is incorrect or may make it difficult to distinguish the differences in the officially submitted evidence.

Other aspects of impartiality include the natural justice in all dealings with the parties. All correspondences must be distributed to both parties as well as other DAAB members, and no meetings should be held privately with either party.¹⁴⁰

4.7.2.7 Independence

The DAAB members must not have any commercial link of any kind with the parties, or any direct or indirect financial interest in the project, such as share ownership, consulting services, employment, etc. However, any financial relation must be declared to the parties

¹³⁹ Gwyn Owen and Brian Totterdill, *'Dispute boards: procedures and practice'* (1st edn, Thomas Telford 2008)

¹⁴⁰ Edward Corbett, 'Moment of decision? The future of dispute boards under the FIDIC forms and beyond' (2009) *Construction Law International* Volume 4 No 3

prior to conclusion of the DAAB agreement. Also, there should not be any discussion or agreement with either party for future business.¹⁴¹

4.8 DAAB in the UAE

The construction industry has grown dramatically in the UAE in the last two decades; although it has slowed down due to the world financial crisis, the UAE is still leading the construction industry in the Middle East. Therefore, it is necessary in the UAE to use a cost- and time-effective dispute resolution mechanism which provides enforceable outcomes as well as interim relief to ensure that it continues to lead the construction industry in the region.

The history of using the FIDIC standard forms of contracts in the UAE shows some employers' reluctance to move from previous versions to the updated ones for different reasons, including the following¹⁴²:

- Each employer used to modify their contract to suit their needs and developed their contract accordingly.
- Over time, the cost of building, testing, and developing the modified form becomes a considerable factor when moving to a new form.
- The employer becomes well aware of their contract's terms and conditions and the risk allocation between the parties, so when they move to a new form of contract,

¹⁴¹ JICA, *Dispute Board Manual* (1st edn Japan International Cooperation Agency 2012)

¹⁴² Kamal Paranawithana, 'Will DAB in FIDIC Red Book Sufficiently Resolve Disputes in Dubai' (2013) SLQS <<http://slqsuae.org/reports-article/>> accessed 17 August 2018

they may need to spend more effort, time, and money in each circumstance during the course of the project.

Moreover, using a specific method of dispute resolution provides a comfort zone to the parties for awareness of all the procedures and requirements when a dispute arises, and this gives the parties a reason not to adopt another dispute resolution mechanism such as the DAAB.

4.8.1 Are employers in the Middle East willing to use DAAB?

The DAB is well known in the UAE construction industry, since the FIDIC forms of contracts are mostly used in the UAE. However, the UAE construction industry have been reluctant to use the Dispute Adjudication Board as a dispute resolution mechanism, even though the DAB has had success in preventing claims from escalating to disputes in different regions by encouraging constructive communication and providing a trustworthy opinion to the parties, which encourages the parties to settle any disputes amicably.

Lack of awareness of the advantages of using DABs in construction projects in the UAE is arguably the main reason behind the unpopularity of the DAB in the UAE¹⁴³, but there are other reasons, such as¹⁴⁴:

- Employers' lack of interest in resolving disputes early, as different levels of disputes will give them better deals at the end of the project.

¹⁴³ Kamal Paranawithana, 'Will DAB in FIDIC Red Book Sufficiently Resolve Disputes in Dubai' (2013) SLQS <<http://slqsuae.org/reports-article/>> accessed 17 August 2018

¹⁴⁴ Ibid

- Employers' and contractors' lack of awareness of the benefit of dispute avoidance in the project's lifetime and cost.
- Less experience with the DAB process in the UAE, as many engineers and employers have never been in a DAB process.
- Assuming that appointing a standing DAB will incur additional cost to the project.
- Some bad experiences with using DABs in the UAE, which led to a number of cases before the courts, which damaged people's view of using DABs. For example, in some cases, noncompliance with the DAB procedural rules by some DAB members affected the future use of DAB as an effective dispute resolution mechanism.

International data and statistics show that most DAB decisions satisfy both parties. For example, DRBF statistics from the US ¹⁴⁵show that 98% of the disputes referred to DABs were resolved, and 98% of the dissatisfied decisions (which are 2% of overall DAB decisions) which are further referred to arbitration or litigation are decided similarly to the DAB's decisions or recommendations.

4.8.2 Enforceability of DAAB decision under UAE law

¹⁴⁵ Dispute Board MENA < <http://www.disputeboardsmena.com/impressive-statistics/>> accessed 2 January 2019

Unlike arbitral awards, DAABs' decisions are not recognized in the UAE's courts.¹⁴⁶ However, this does not mean that DAABs' decisions are not enforceable under UAE legislation, as some professionals thought: The UAE civil code preserves the good faith principle and the freedom of contract, and these two principles are significant for enforcement of DAB decisions before UAE courts. Since the parties are free to choose the contractual terms, if the DAB provisions were part of these terms, then the parties must abide by the DAB's decisions under the principle of acting in good faith, and failure to do so will result in the defaulting party's being considered in breach of the contract.¹⁴⁷

Another option to enforce a DAB's award before the UAE courts is to consider the DAB's decision as a debt or to seek an attachment order, where the UAE courts have the power to do so. However, that is only applicable if the court considers that the arbitration clause in the contract is for dispute referral.¹⁴⁸

4.8.3 Desired actions to promote DAAB in UAE

There is a common thought among employers in the UAE that using an alternative dispute resolution mechanism such as the DAAB is not necessary based on the assumption that using such methods may deteriorate their commercial position and add unnecessary extra cost to the project over using a standing DAB, and even the provision of a DAB is usually deleted from construction contracts in the UAE, despite the fact that the historical record

¹⁴⁶ Adrian Bell and Aidan Steensma, 'Enforcing DAB decisions under the FIDIC form: uncertainty continues' (2015) CMS Law-Now < <http://www.cms-lawnow.com/ealerts/2015/06/enforcing-dab-decisions-under-the-fidic-form-uncertainty-continues?>> accessed 20 January 2019

¹⁴⁷ Ibid

¹⁴⁸ Kamal Paranawithana, 'Will DAB in FIDIC Red Book Sufficiently Resolve Disputes in Dubai' (2013) SLQS < <http://slqsuae.org/reports-article/>> accessed 17 August 2018

shows that using a DAB is less costly and time-consuming for dispute resolution or even dispute prevention compared to litigation or arbitration.¹⁴⁹

Even with the positive changes in the new FIDIC Red Book to encourage the industry to use the DAAB widely, some measures still need to be taken in order for the DAAB to be widely used in the UAE. Most of these actions should come from the top level, as happened earlier in the UK.

The first and most important action is that the DAAB's non-final decision must be recognized by legislation, which is the first thing that parties look for when they are choosing the method of dispute resolution.¹⁵⁰

Government entities may take the lead in adopting the DAAB as a mandatory dispute resolution mechanism in their contracts; this will definitely encourage the market to follow similar steps, especially when they recognize the benefit of using DAABs in construction contracts.

On the other hand, construction-related international organizations such as FIDIC, CIARB, RICS, CIOB, etc. must encourage the construction community in the UAE to adopt the DAAB in their construction contracts by providing seminars to educate the community

¹⁴⁹ Nicholas Gould, 'Enforcing a Dispute Board's decision: issues and considerations' (2011) Introduction to International Adjudication – Conference < <https://www.fenwickelliott.com/research-insight/articles-papers/enforcing-dispute-board%E2%80%99s-decision-issues-and-considerations>> accessed 14 January 2019

¹⁵⁰ Adrian Bell and Aidan Steensma, 'Enforcing DAB decisions under the FIDIC form: uncertainty continues' (2015) CMS Law-Now < <http://www.cms-lawnow.com/ealerts/2015/06/enforcing-dab-decisions-under-the-fidic-form-uncertainty-continues?>> accessed 20 January 2019

about the advantages and benefits of using DAAB, with some government support in this regard.¹⁵¹

¹⁵¹ Ibid

CHAPTER FIVE

THE DISPUTE RESOLUTION

The two primary objectives of the DAAB are to assist in the avoidance of disputes between the parties; and to achieve swift, cost-effective and efficient resolutions of disputes that may arise between them.

In order to do so, the DAAB shall conduct meetings with the parties and visit the site periodically to stay aware of site progress and all events and circumstances that may arise in a disagreement between the parties. These meetings and site visits shall be within a 10 to 20 weeks interval unless, upon the request of either party, there is a critical construction circumstance (such as termination of the contract or suspension of the work), or an urgent matter arises that requires the DAAB to hold a meeting with the parties. This could be a remote meeting, such as a video conference, held within three days of such a request, and if necessary, involve a visit to the site. Within 14 days of the meeting, the DAAB shall prepare a report of all activities held during the meeting or the site visit and send it to both parties and the engineer. All DAAB activities including meetings, site visits, hearings, reports, communications and so on shall follow the language stated in the contract, unless otherwise agreed upon by both parties and the DAAB¹⁵².

¹⁵² Anthony Albertini, 'The role of dispute adjudication boards under FIDIC: a view from the Courts' (2014) CLYDE&CO < <https://www.clydeco.com/insight/article/the-role-of-dispute-adjudication-boards-under-fidic-a-view>> accessed 10 January 2019

The power of the DAAB procedure is that all levels of disputes between the two parties—whether it is technical issue, procedural matter, document interpretation or misunderstanding can be easily referred to an independent third party who will provide informal advice or a binding decision to resolve such disputes. The DAAB must apply the contract’s provisions and the governing laws in any advice or decision.

5.1 Obtaining a DAAB Decision

If a dispute arises between the parties, then either party may seek a DAAB decision by referring the dispute to the DAAB. This referral shall be in writing, sent to the other party and to the engineer, stating the contract’s provision under which it is made with all substantiation documents. Also, it should include a statement of the claim and relevant analysis.¹⁵³

Upon receiving the referral by the DAAB (the date when it is received by the chairman in case of three members DAAB), both parties shall facilitate to the DAAB all required information, access to the site and any other DAAB requirements necessary to make a decision on the dispute. The chairman of the DAAB shall send notification to the parties of the referral date along with procedural directions for the dispute resolution process, which may include the steps involved, and schedule for the process.¹⁵⁴

¹⁵³ Dean O’Leary, ‘Using Dispute Adjudication Boards to Resolve Construction Disputes’ (2016) Al Tamimi & Co <<https://www.tamimi.com/law-update-articles/using-dispute-adjudication-boards-to-resolve-construction-disputes>> accessed 10 January 2019

¹⁵⁴ Anthony Albertini, ‘The role of dispute adjudication boards under FIDIC: a view from the Courts’ (2014) CLYDE&CO <<https://www.clydeco.com/insight/article/the-role-of-dispute-adjudication-boards-under-fidic-a-view>> accessed 10 January 2019

In addition to the DAAB's power to decide the suitable procedural directions based on the nature of the dispute, the DAAB also has the power to decide, on its own authority, the scope of the dispute; appoint experts; conduct hearings; and schedule meetings and site visits as required to make decisions and review and revise the engineer's actions related to the dispute.¹⁵⁵

The DAAB decision shall be reasonable, provided in writing within 84 days of the date of referral, and circulated to the parties and the engineer. As long as the decision is not revised by amicable settlement or arbitral award, the decision shall be considered binding by both parties and be complied with immediately. In addition, the work shall continue, irrespective of any NOD given by either party.¹⁵⁶

Any payment required to be paid from one party to the other as a part of the DAAB decision shall be payable immediately, without any further notice or certificate. An appropriate security for the payable amount may be requested from the payee to ensure repayment of the amount in the event the decision is revised by amicable settlement or arbitral award.¹⁵⁷

If either party decides to reject the DAAB decision or any part of it, then the dissatisfied party shall, within 28 days of the DAAB decision, issue a formal NOD to the other party, the DAAB and the engineer. The NOD must specify the rejected part of the decision and

¹⁵⁵ Ibid

¹⁵⁶ Stephenson Harwood, 'Dispute resolution under FIDIC 2017' (2018) < <http://www.shlegal.com/insights/dispute-resolution-under-fidic-2017>> accessed 20 August 2018

¹⁵⁷ Anthony Albertini and Rachel Chaplin, 'The Role Of Dispute Adjudication Boards Under FIDIC: A View From The Courts' (2014)

<<http://www.mondaq.com/x/356714/Contract+Law/The+Role+Of+Dispute+Adjudication+Boards+Under+FIDIC+A+View+From+The+Courts>> accessed 5 January 2019

the reason for dissatisfaction. However, if no DAAB decision has been issued within 84 days of the date of referral, then either party can issue a NOD within 28 days of the expiry of this period.

If neither party has issued a NOD within a 28-day period, then the DAAB decision becomes final and binding on both parties.

5.2 Negotiation and Amicable Settlement

According to the Global Construction Disputes Report (2017)¹⁵⁸, parties prefer negotiation and amicable settlement over other methods of dispute resolution. The reasons behind this may include the fact that only the exact parties involved in the dispute will be a party to the process, which allows them to openly present their concerns and ideas. Nevertheless, if the parties try to get the best deal, negotiations will end up being a long, drawn-out process with multiple discussions and meetings that may not result in an agreement.¹⁵⁹

If the NOD on the DAAB's decision has been issued on time, a mandatory 28 days shall be allowed for the parties to resolve the dispute amicably prior to referring the dispute to arbitration. Unless otherwise agreed to by both parties, commencement of the arbitration process may start on or after 28 days from the date of issue of the NOD, even if a negotiation was not attempted.

5.3 Arbitration – The Last Step to Resolve a Dispute

¹⁵⁸ Eugenio Zoppis, 'DAAB and Dispute Resolution Under the 2017 FIDIC Forms of Contract' (2018) King's College, London

¹⁵⁹ Gwyn Owen and Brian Totterdill, '*Dispute boards: procedures and practice*' (1st edn, Thomas Telford 2008)

If no agreement has been reached after the expiry of the 28 days of negotiation for an amicable settlement, then either party may refer the dispute to arbitration. The existence of a DAAB decision in any dispute that has been referred to a DAAB is a condition precedent to commence the dispute to further the arbitration proceeding.

Other cases where parties may refer the dispute to arbitration include¹⁶⁰:

- a. If the losing party fails to comply with a final and binding DAAB decision, then the other party has the right to refer the failure itself to arbitration. This allows the arbitral award procedure to be applied on the DAAB decision.
- b. If a dispute arises while there is no DAAB in place due to expiry of the DAAB appointment or the DAAB is not constituted, then either party may refer the dispute directly to arbitration, with no condition precedent to the DAAB decision or amicable settlement.

When the dispute is referred to arbitration, the arbitration shall commence in accordance with the Rules of Arbitration of the International Chamber of Commerce (ICC) by one or three arbitrators, using the ruling language as defined in the contract, unless otherwise agreed to by both parties.

Upon commencement of the arbitration process, the tribunal shall have the full power to review, reopen and revise any determination, valuation or certificate issued by the engineer,

¹⁶⁰ Stavros Brekoulakis and David Brynmor Thomas, *The Guide to Construction Arbitration*, (Law Business Research, 2017)

as well as the DAAB decision related to the dispute, unless such determination of the engineer or the DAAB decision is final and binding.¹⁶¹

Moreover, the parties are not limited to the previous evidence or arguments put before the DAAB when seeking its decision; also, the DAAB decision is considered acceptable evidence in the arbitration.

If the arbitral award contains payment of any amount, this amount becomes payable without the requirement of further certificates or notices; however, the obligations of the parties, the engineer and the DAAB shall remain unaltered if the arbitration is conducted during the progress of the work.¹⁶²

CHAPTER SIX

SURVEY ANALYSIS AND FINDINGS

6.1 Introduction:

The methodology of the research depends on reviewing the related literatures as the primary source of information supported by a survey questionnaire from the field

¹⁶¹ Eugenio Zoppis, 'DAAB and Dispute Resolution Under the 2017 FIDIC Forms of Contract' (2018) King's College, London

¹⁶² Ibid

professionals and experts, some limitations were found during the course of the research represented by a limited academic commentary on the new FIDIC Red Book including the new dispute resolution mechanism, also many of the potential survey participants refused to participate due to unfamiliarity with the new edition of the FIDIC Red Book.

The literatures of the previous versions of the FIDIC Red Book were reviewed to identify the related modification in the new version and to highlight the closed gaps in the new version. Also the empirical data used relies mainly on the professionals from different categories involved in the construction projects (employer, contractor, consultant etc.) that have enough information and review on the new FIDIC Red Book and its new dispute resolution mechanism to cover most of the stakeholders view on the new version.

The questionnaire is designed to examine the efficiency of the dispute resolution mechanism under The 2017 FIDIC Red Book; this aim is fortified by the following group of questions divided according to the objectives of the study as follow:

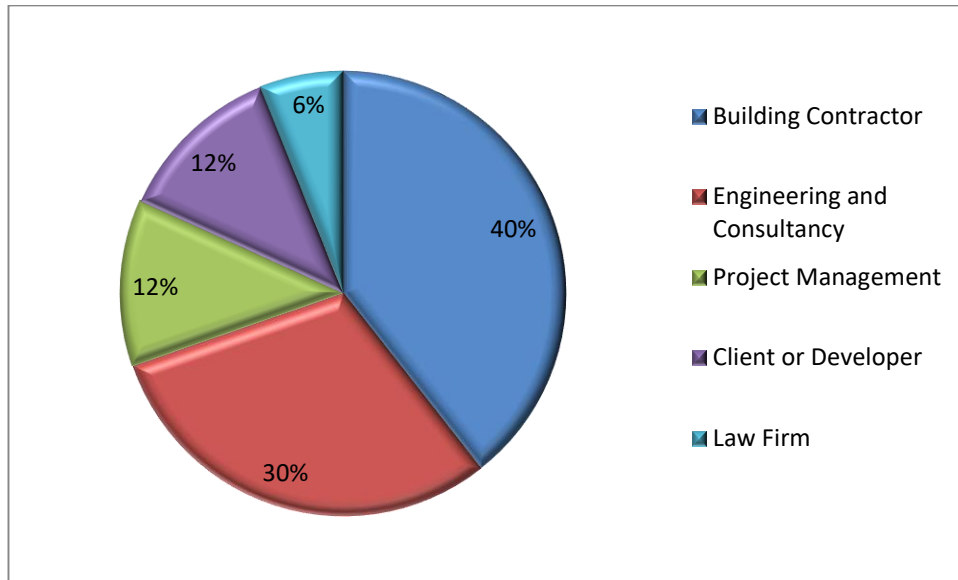
- The First question is designed to understand the roots of the disputes in construction contracts.
- The second group of questions is related to testing the importance of DAAB roles in construction projects.
- Third group is to assist in analyzing the improvement of the dispute resolution mechanism under The 2017 FIDIC Red Book.
- Last group of questions is to determine whether the development of the dispute resolution mechanism under The 2017 FIDIC Red Book will encourage the

construction industry (especially UAE) to adopt this mechanism in construction contracts.

6.2 Questionnaire Analysis and Findings

The questionnaire contains twenty four multiple choice questions with an option of ‘Other’ box in each question in order to allow the respondents to express their opinions by adding comment, note or other choice which is not part of the question. The results of the questionnaire is presented in the following section along with interpretation of the result in accordance with the dissertation’s aim and objectives.

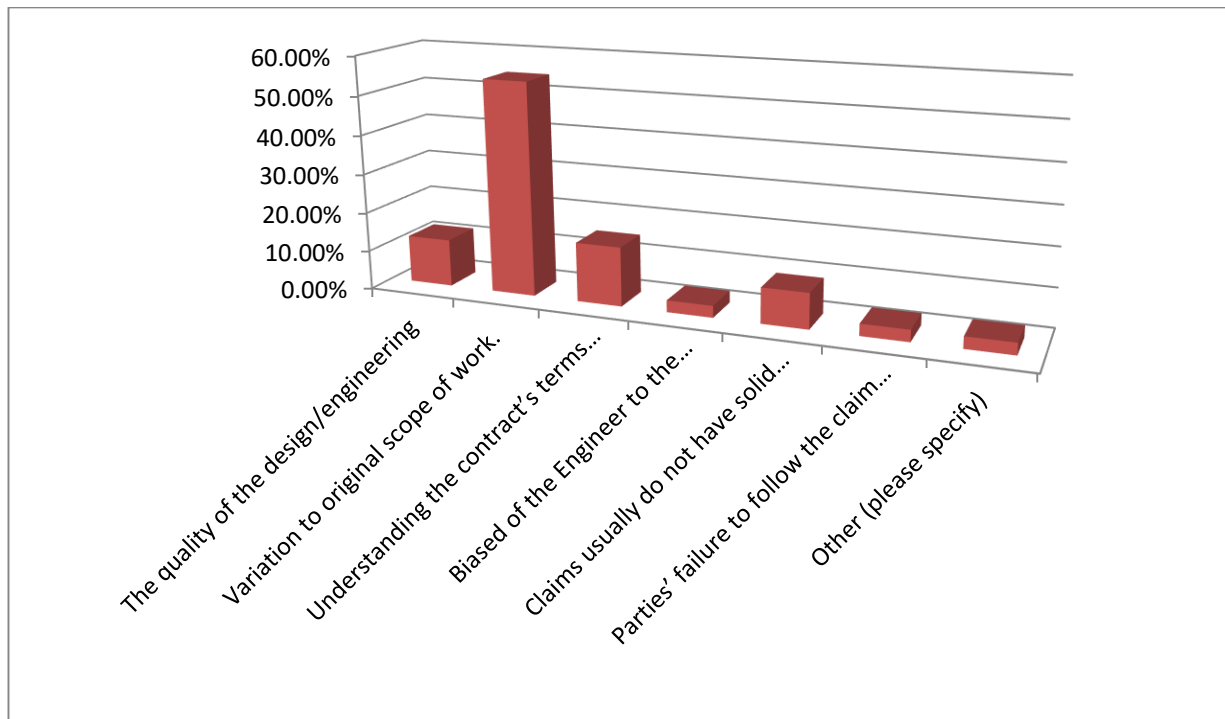
Q1. Which of the following best describe your professional background?



This question was asked to demonstrate the background verities of the participant to make sure that the survey does not reflect the opinions of one of the construction project parties. The answers show that the majority of the participants are from the contracting and the consultancy firms which usually they are the most involved in the day to day construction process and that give by some means realistic results.

This group of questions is related to determine the importance of DAAB roles in construction projects.


Q2. In your opinion which of the following is the main reason of dispute in construction contracts?

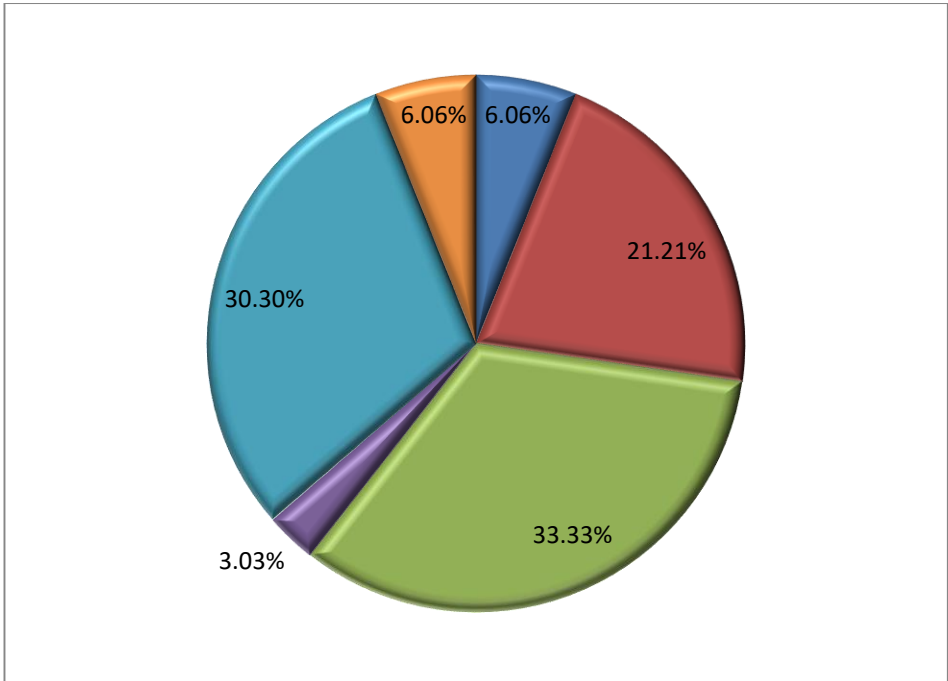


According to the survey the cause of the majority of the disputes is the variation to the original scope, this is expected as almost no construction project can be completed without a change in scope, the dispute arises usually due to unreasonable claim for additional works or if the changes were in the original scope or not, and this is link to the second most causes of the disputes that are the quality of the design and interpretation of the contract's terms and conditions.

Few other reasons were identified with less probability of happening according to the survey.

Q3. In your opinion what would be the main benefit for the parties of using DAAB as a dispute resolution mechanism in construction contracts?

- Cost efficiency compared to other dispute resolution mechanism.
- Time saving compared to other dispute resolution mechanism.
-  ■ Maintain Good Business relationship between parties.
- Improvement of the quality of work.
- Parties able to select decision makers (to solve the disputes) with appropriate skills, technical expertise and experience for the project/contract.



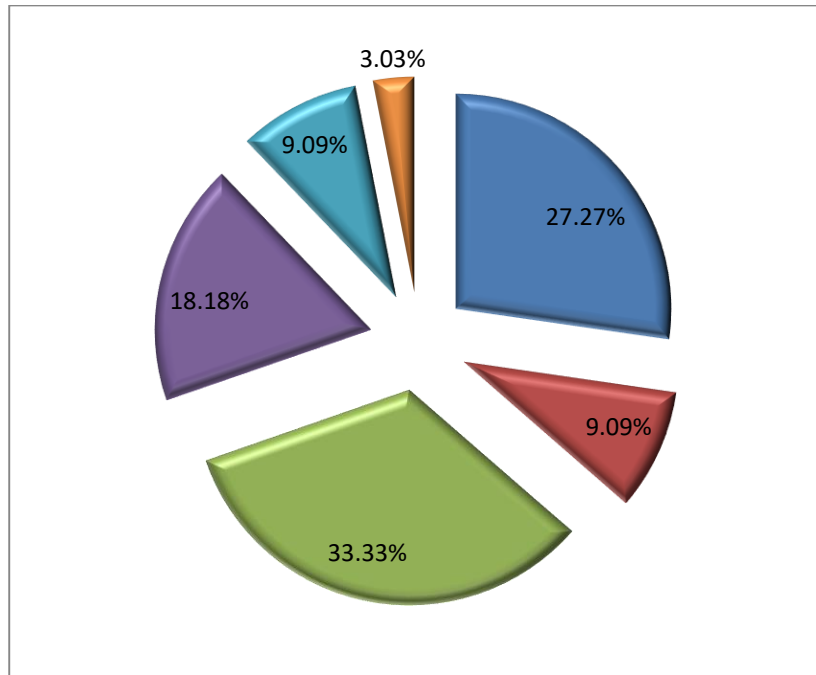
Despite that most of the people are seeking to resolve their dispute in cost and time effective way, the highest percentage goes to maintain the relationship between the parties which are the main benefits from using DAAB in the construction project. DAAB is fast and cost effective dispute resolution mechanism compared to other dispute resolution mechanisms, DAAB shall make a decision on the Dispute within 84 days from the date of referral, and the costs of the DAAB are between 0.05% to 0.25% of the construction costs on dispute free projects to more complicated

projects according to DRBF also the new DAAB's role of dispute avoidance will certainly maintain a good relationship between the parties as well as reduce the time and cost spend in resolving disputes.

Q4. In your opinion what would be the main disadvantage of using DAAB as a dispute resolution mechanism in construction contracts?

- Need to make decision within specified time limit may prevent an in-depth analysis of all the relevant issues (factual and legal).
- Unless expressly authorized by parties, panel lacks power to order joinder or consolidation of disputes arising under a separate contract with disputes arising under the contract in question.
- Decision of panel is only enforceable as a matter of contract, not as judgment of court or award of arbitral tribunal (may be costly to enforce panel's decision in the event of non-compliance by a losing party).
- Panel decisions are not binding precedents upon parties.

- Panel not bound to follow rules of natural justice in carrying out their investigation and reaching decision.
- Other (please specify)



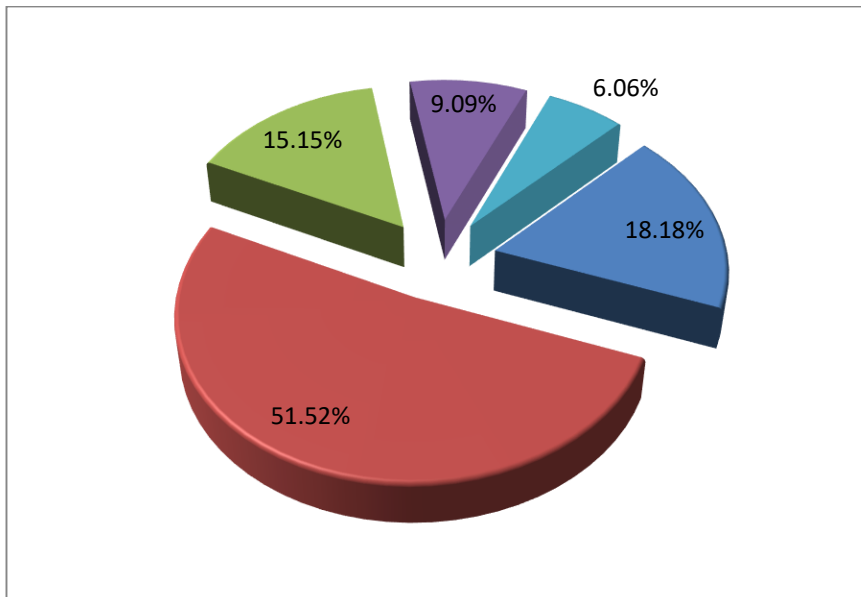

The main disadvantage of using DAAB according to the respondents is that unlike the arbitral awards or court judgment the DAAB decision is only enforceable as a matter of contract and may be come costly to enforce such decision if not voluntarily complied by the parties, this is link with the third disadvantages which is unbinding DAAB decision may result in extra burden on the winning party to enforce it, this concerns from the construction professionals need to be considered in the country legislation to allow the local courts recognizing the DAAB decision.

The time limitation in making a DAAB decision is another concern for the parties which may not allow the DAAB members to deeply analyze the evidences of the disputed matter, however if the parties choose a standing DAAB this concern will be eliminated as the DAAB will be aware of all events and circumstances may lead to a dispute.

The panel's power and rules are less concerns for the professionals and that may be avoided if parties are acting in good faith.

Q5. In your opinion what is the significance of the dispute resolution provision in construction contract?

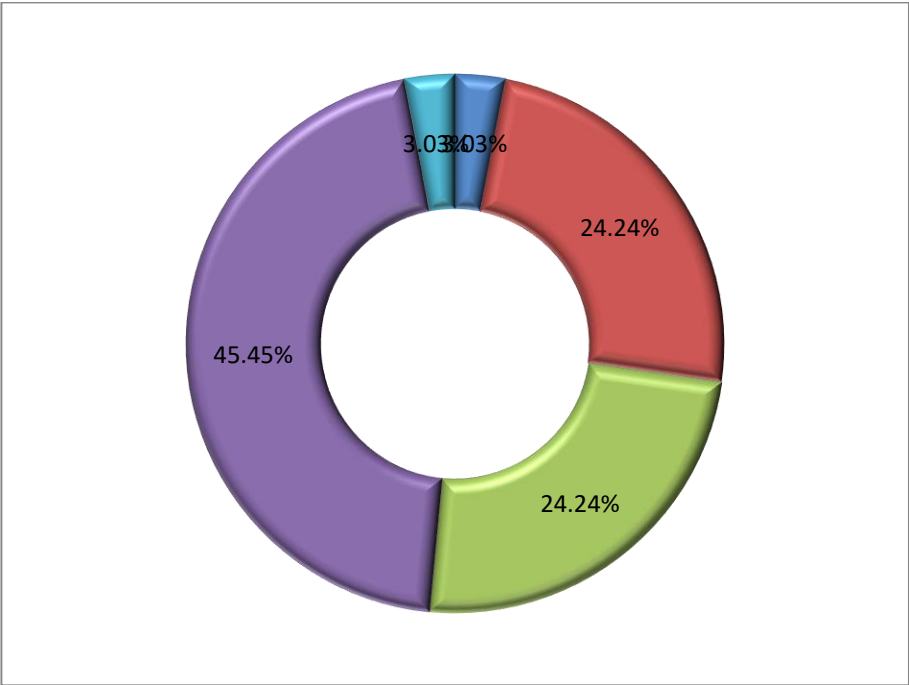
- Stakeholders want work delivered on time and within budget by avoiding disputes using multi-tiered dispute resolution provisions.
- Allows parties resolve dispute swiftly and efficiently.
- Minimize disruption to the project.
- Ensures that disputes are finally resolved through litigation or arbitration.
- Other (please specify)



With regards to the importance of the dispute resolution provisions in the construction contracts, the majority of the respondents believed that resolving any dispute swiftly and efficiently is significant which is complied with the responses in question three above.

Q6. In your opinion, the main reason why parties fail to include dispute resolution provisions in their contract is:

- Parties decide the contract terms and conditions very quickly in short time.
- Reluctance by parties to acknowledge problems might arise in future.
- ■ Pressure to finalize negotiations and execute the work.
- Lack of serious consideration the importance of dispute settlement in construction contracts.
- Other (please specify)



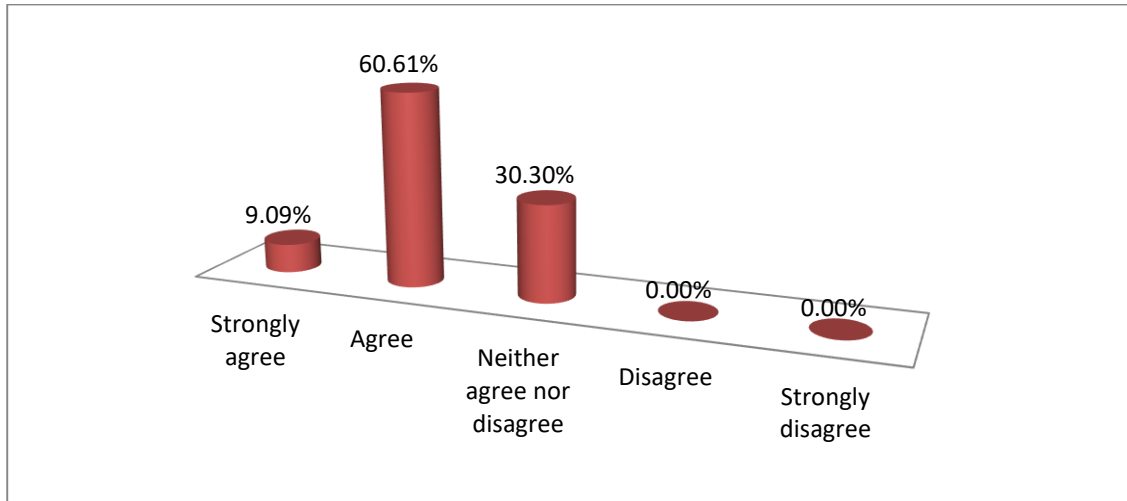
The majority of the respondents believe that lack of serious consideration the importance of dispute settlement in construction contracts is the main reason of failure to include a dispute resolution provision in the construction contracts followed by reluctance by parties to acknowledge the problems might arise in the future and the pressure to finalize the negotiations to proceed with execution of the works as second reasons.

Although the majority of the respondents acknowledge the significant of the DAAB provision in construction contracts as seen in question five, the result of this question shows that obviously there is lack of awareness amongst the construction industry with regards to the importance of the dispute resolution provision in the construction contracts, the culture of the industry need to be changed by promoting the needs of the alternative dispute resolution in the construction contracts, the burden of this relies on the construction professionals who were involved in DAAB before as well as professional bodies such as CIArb, CIOB that have influence in the construction field along with statutory legislation.

The following questions are to assist in analyzing the improvement of the dispute resolution mechanism under The 2017 FIDIC Red Book.

Questions 7 to 14 aim to gather the professional opinions with regards to improvement of the dispute resolution mechanism under The 2017 FIDIC Red Book,

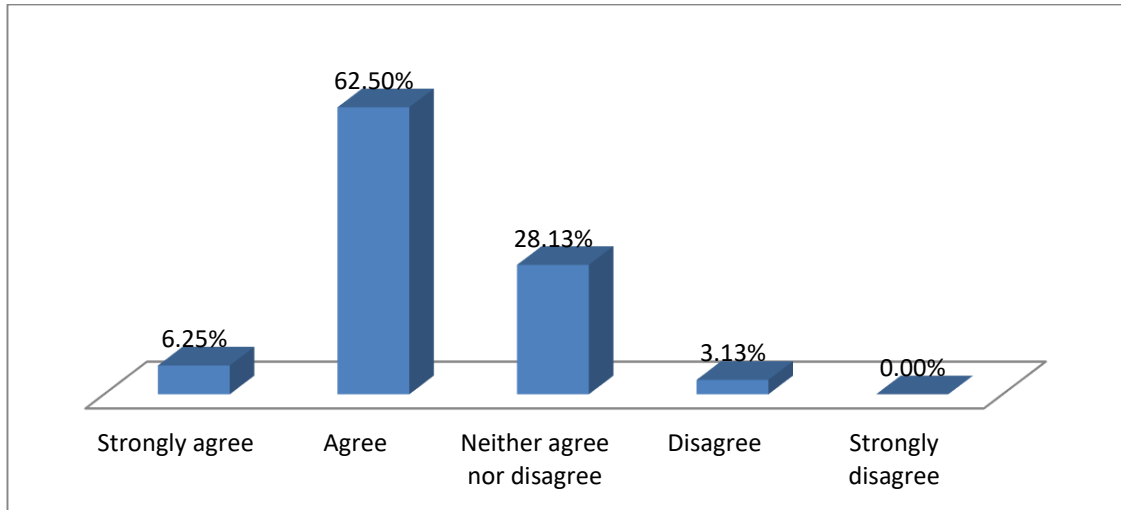
Q7. The new FIDIC Red Book is more neutral between parties compared to 1999 version which was considered biased to the employer



Unsurprisingly almost 70% of the participants agree or strongly agree that the new FIDIC Red Book has improved the neutrality between the employer and the contractor which was one of the addressed issues in the previous revision, this represented by enhancing the project management mechanisms, achieving balanced risk allocation between parties using more reciprocity between the parties and strengthening the role of the engineer.

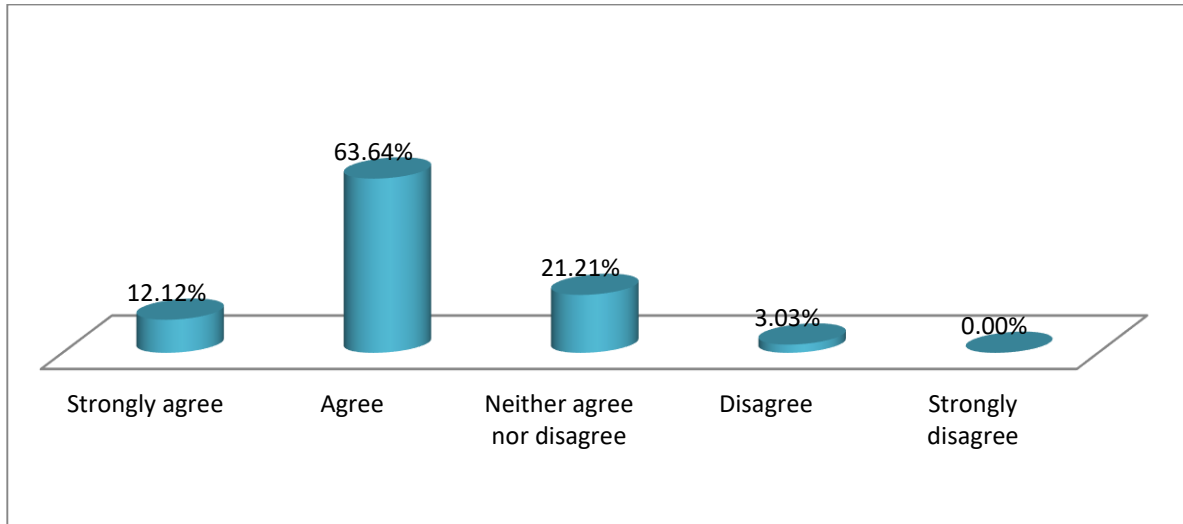
However, there is still considerable percentage of professionals who are not convinced that the neutrality between parties has been improved in the new version, testing the new version in the market may be required to clear the doubt about the neutrality of the new version.

Q8. FIDIC has achieved the required improvement in the new revision by filling all gaps in previous one.



One of the objectives of the FIDIC updates is to fill the gaps in the previous revision based on the industry feedback, which FIDIC has succeeded in all previous revisions and the new revision is not an exception, the longer and better structured version of the FIDIC standard forms of contracts along with redefinition of some important terms are part of many clear steps to fill the gaps in the previous revision, the survey shows that 62.5% agree and 6.25% strongly agree on this thought, however, 3% only disagree while 28.1% decided to be neutral on this concept.

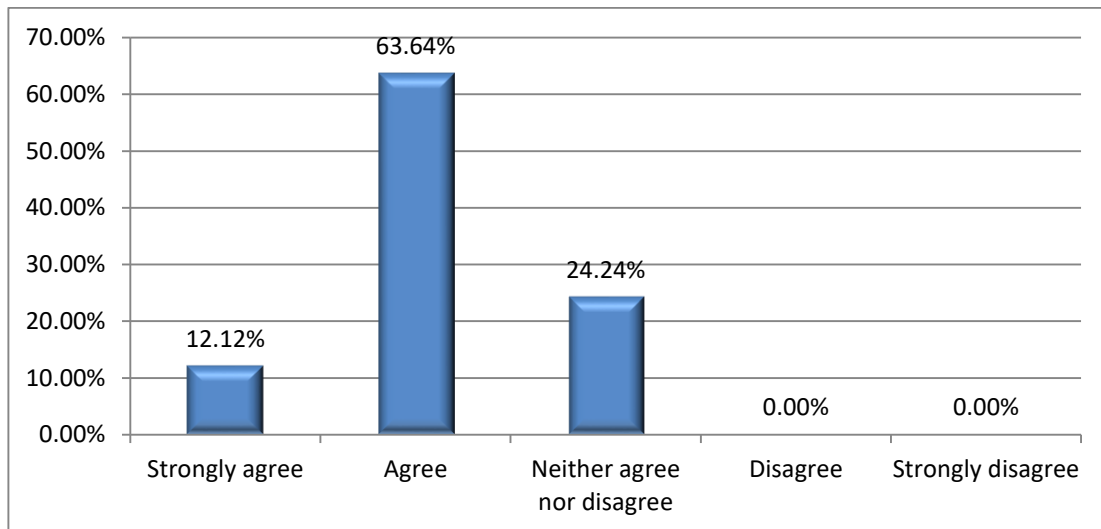
Q9. FIDIC has enhanced project management tools and mechanisms in the new FIDIC Red Book.



The enhanced of the project management tools and mechanism is one of the main features of the new FIDIC Red Book, several aspects and changes has led to this improvement such as a detailed claim procedure, mandatory of the notices from both parties, one claim procedure for both parties, the roles of the engineer and other modifications.

Over 75% of the respondents agree or strongly agree that FIDIC has successfully enhanced the project management mechanism within the new Red Book while only 3% disagree and , 21% of the respondents neither agree nor disagree, this is in line with the FIDIC's goals of issuing the new revision.

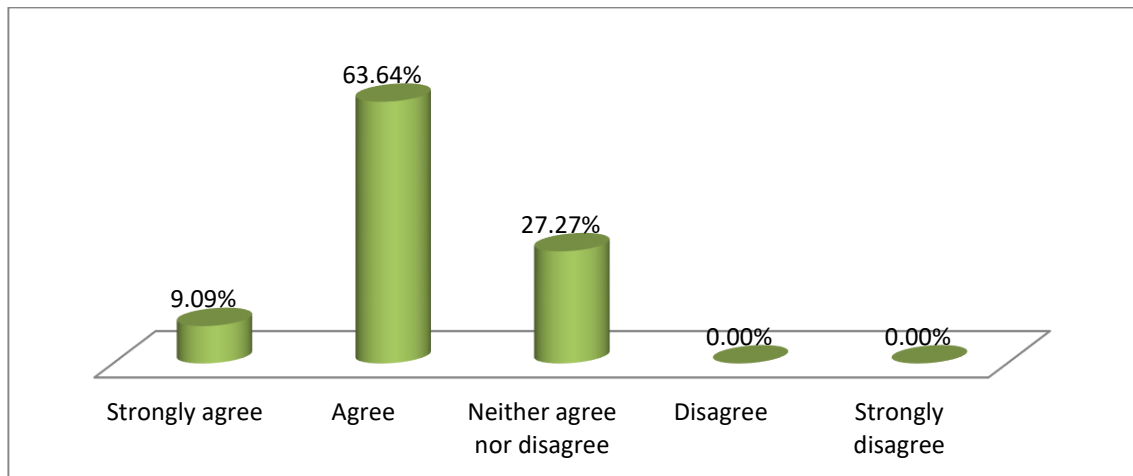
Q10. FIDIC has reinforced the role of the Engineer in the new FIDIC Red Book.



The Engineer's roles has been clarified and expanded in the new FIDIC Red Book which aims to increase the project management and prevent disputes, this is represented mainly by expand the claim determination duty to include an obligation to consult and encourage parties to reach an agreements, and to ensure the required time frame for any claim has been followed by the claimant party.

The survey shows that three fourth of the participants agree and strongly agree that the engineer's roles has been reinforced which will lead to enhancement in the project management and reduce the number of disputes between parties.

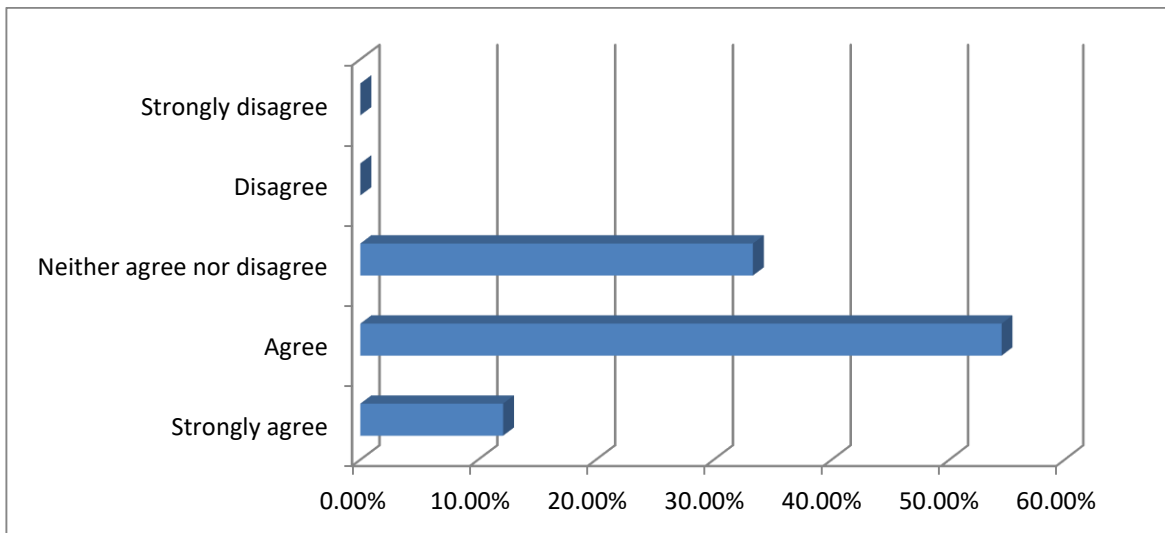
Q11. FIDIC has achieved a balanced risk allocation. This is being achieved through more reciprocity between the Parties.



One of the main goals of any construction contracts is to allocate the risks between the contracting parties; achieving balance risk allocation between the parties was reflected in the updated FIDIC contracts by enhancing number of rights and obligations in the reciprocal state.

Over 70% of the respondents agree or strongly agree that FIDIC has successfully achieved fair and balance risk allocation between the parties and 27% of the respondents neither agree nor disagree on this concept, this is in line with the FIDIC's goals of issuing the new revision.

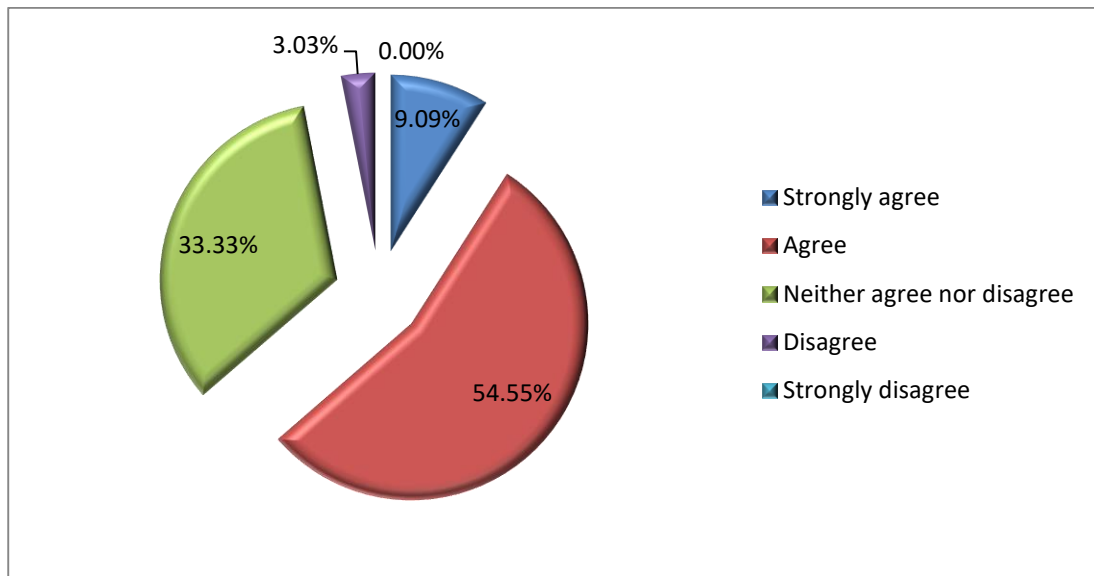
Q12. FIDIC has achieved clarity, transparency and certainty in the new FIDIC Red Book.



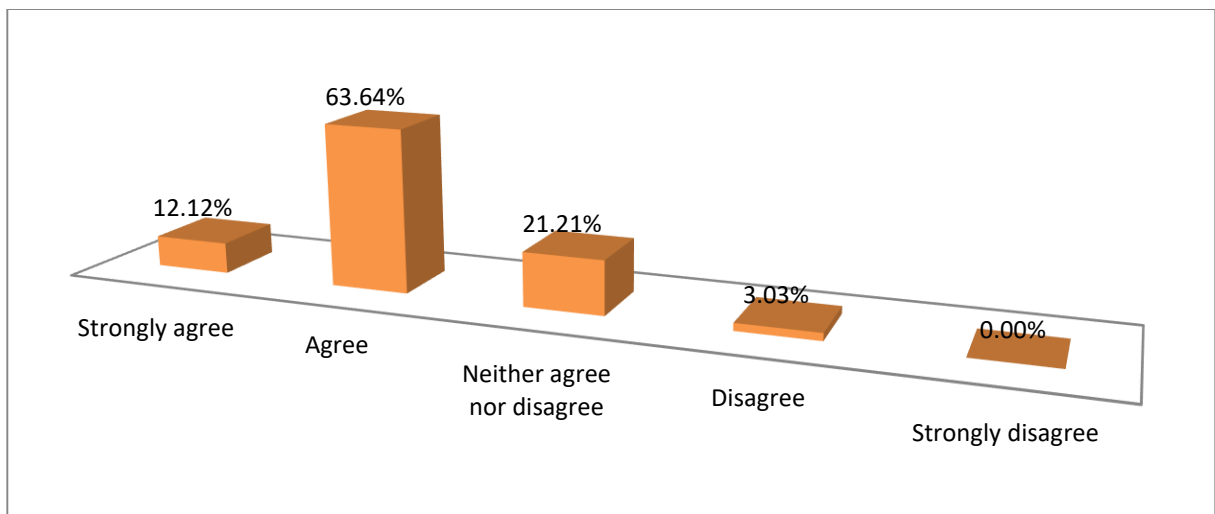
More than 60% of the survey participants were in agreement of the concept of more clear, transparent and certain terms and conditions has been achieved in the new revision of the FIDIC Red Book, however, one third are not certain about that.

The survey result concur the core aim of the majority of changes in the new FIDIC Red Book to increase clarity, transparency and certainty in the contract's terms and conditions which will lead to increase the probability of projects successful by reducing the disagreements between the parties.

Q13. FIDIC has reflected current international best practice in the new FIDIC Red Book.



Q14. FIDIC has incorporated most recent development in FIDIC contracts, and increased emphasis on dispute avoidance.

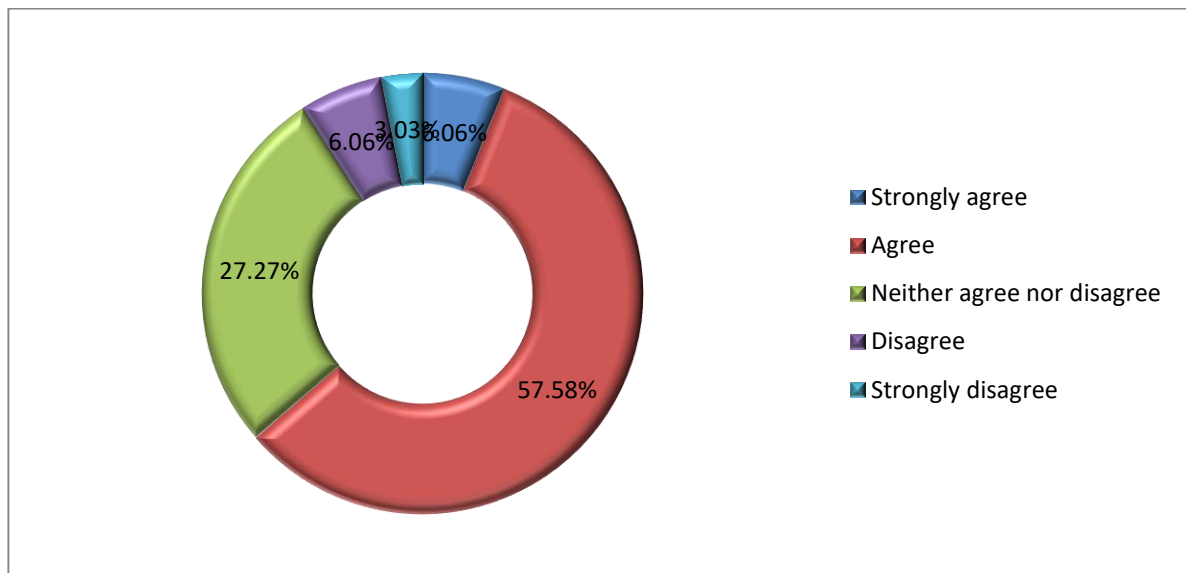


FIDIC has adopted best practices and international standards and incorporated most recent development in preparing the new FIDIC Red Book to reflect the challenges in the current construction industry and increased emphasis on dispute avoidance.

Two questions were asked to identify to which level the professionals in the construction industry are convinced with this statement, the results were as expected where the majority of the participants were in agreeing with this concept with almost one forth were neutral, while only 3% disagree with this concept which can be interpreted as a different of point of views based on the familiarity of the international best practices and the recent development in construction industry.

Next questions are to determine whether the development of the dispute resolution mechanism under The 2017 FIDIC Red Book will encourage the construction industry (especially in the UAE) to adopt this mechanism in construction contracts.

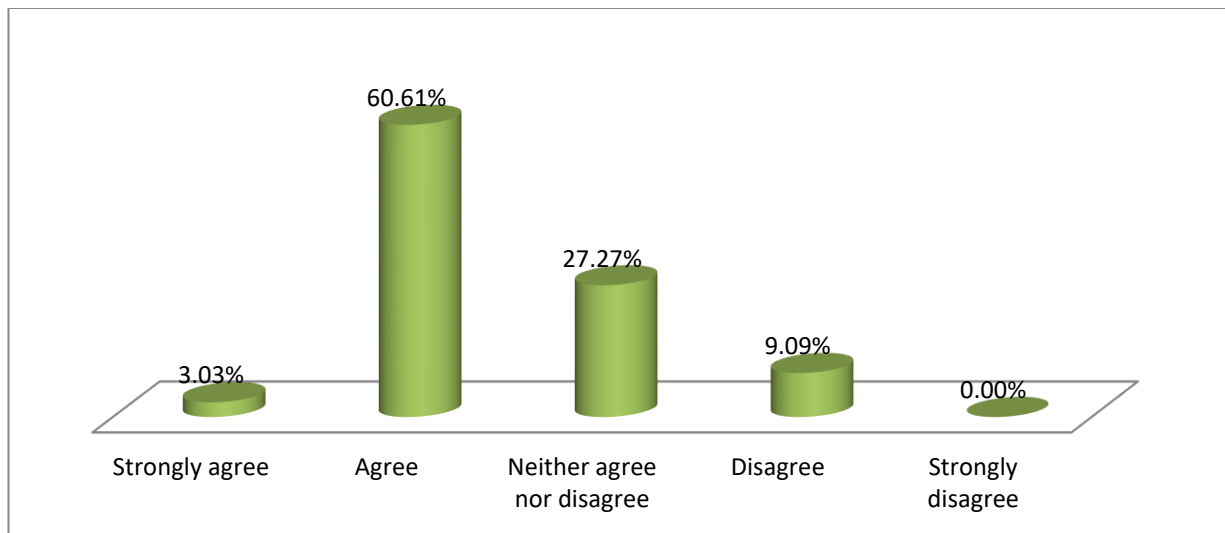
Q15. More structured procedure in the new FIDIC Red Book will reduce the dispute resolution effort.



Arguably as long parties acting in good faith the dispute goes to minimum, this idea is emphasis by 10% of the professionals who participate in the survey; however, over 60% agree and strongly

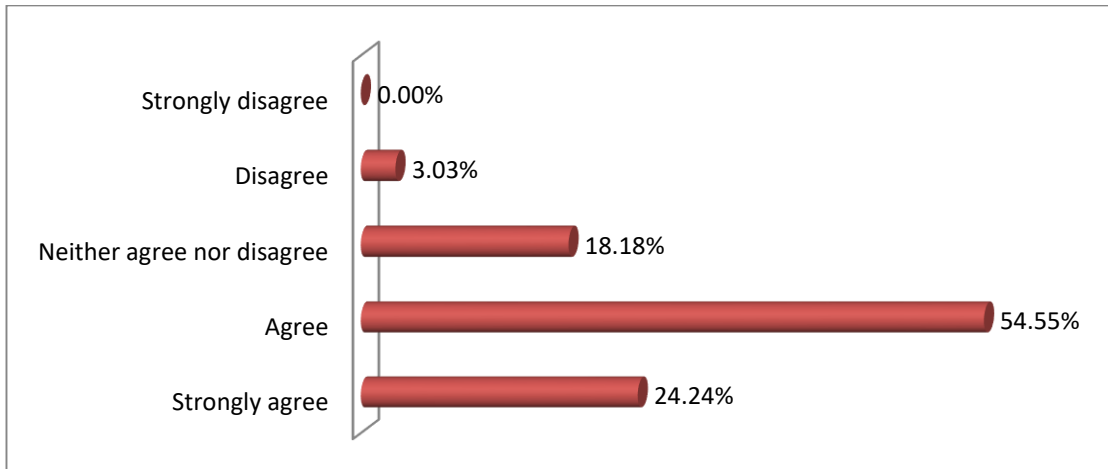
agree that a good structured claim and dispute resolution procedure will definitely reduce the level of dispute between the parties. The rest of participants neither agree nor disagree, this is understandable as the disputes may arise due to different reasons irrelevant to the procedures followed in the contracts as seen in question two.

Q16. The Cost of Dispute Resolution Mechanism selection by Parties is the main factor to choose the mechanism.



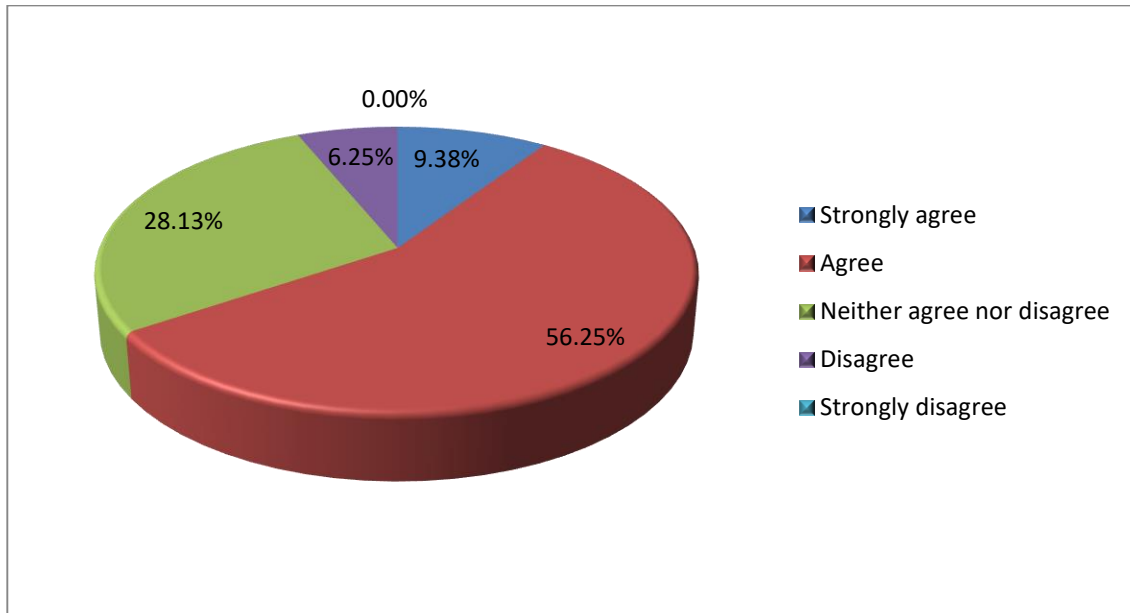
Over 60% of the respondents will choose the most cost effective mechanism to resolve their disputes, however, almost 30% consider that other factors play also major role in selecting the dispute resolution mechanism while almost 10% only believe that the cost is not important for selection of the dispute resolution mechanism.

Q17. The Speed of Dispute Resolution process (reaching an agreement, getting an award or final decision) is an important factor in construction projects.



Almost 80% of the respondents require fast decision dispute resolution mechanism over other factors, this is understandable especially when there is a lack of cash flow in the market or the dispute comprises a huge amount which affecting the parties cash flow, in these cases parties may seek a fast decision over the extra cost they may incur, again some still consider other factors to be able identify the best dispute resolution mechanism they may adopt, less than 20% are in this consideration.

Q18. The Enforceability of the Dispute Resolution Mechanism outcomes is the main factor to choose the mechanism.

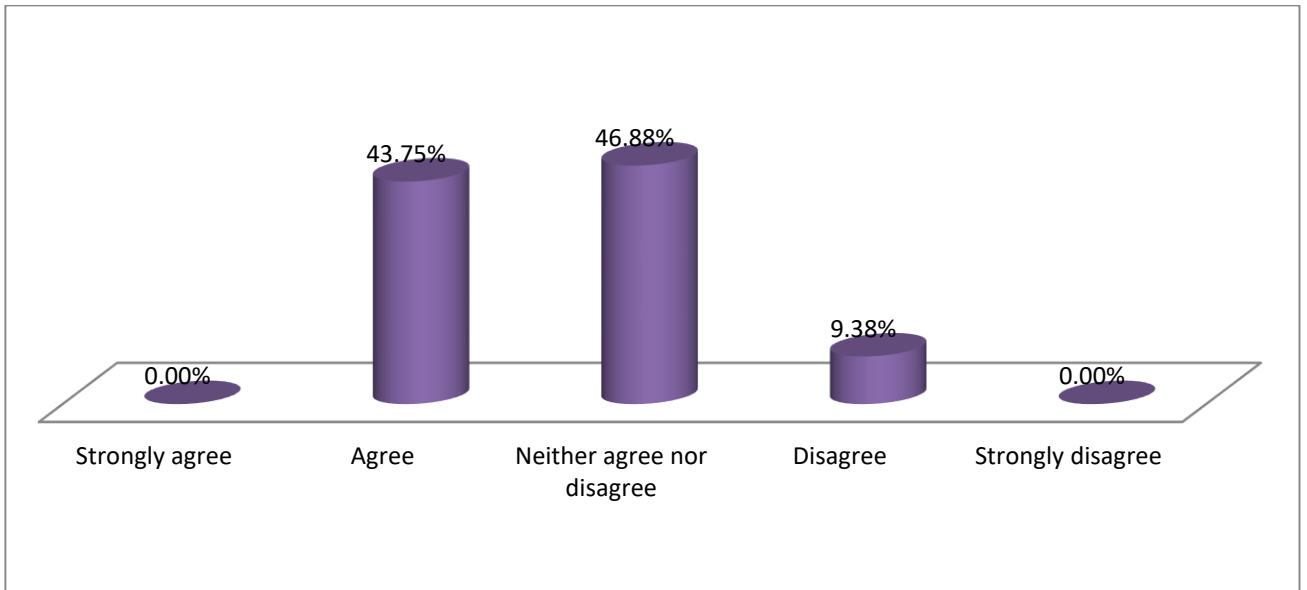


What is the value of a decision without enforceability? Many professionals argue that any unenforceable decision has no value as the winning party must benefit from the decision in order to be considered valuable, over 65% of the respondents seem to agree with this concept while less than 7% disagree while 28% are neutral.

The last three questions identify the main factors that people consider when selecting a dispute resolution mechanism, the main three factors are the speed and the cost pertaining to the method of dispute resolution and the level of enforceability of the dispute resolution outcomes.

DAAB is fast and cost effective compared with other dispute resolution mechanisms, but it needs further efforts to endorse its outcomes in some jurisdiction, in UAE the DAAB decision is not recognized in the courts which may prevent using the DAAB widely in UAE.

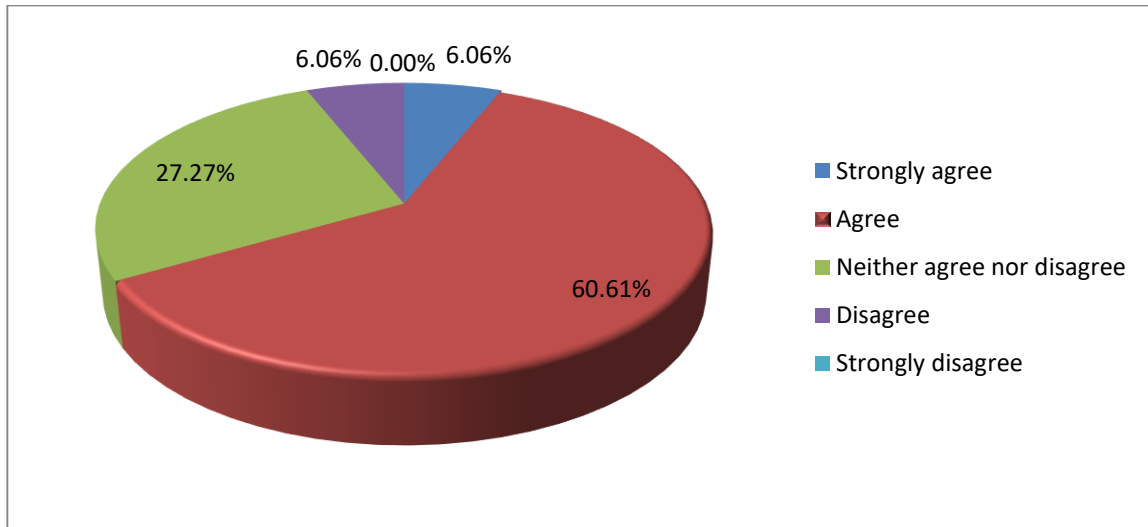
Q19. The new DAAB procedure has covered all gaps in previous revision.



The result of this question raise the flag that a considerable part of the construction professionals are not certain that the gaps in the previous DAB procedure were not covered in the new procedure, this is represented by 47% of the participants while 44% agree that all gaps are covered and only 9% disagree.

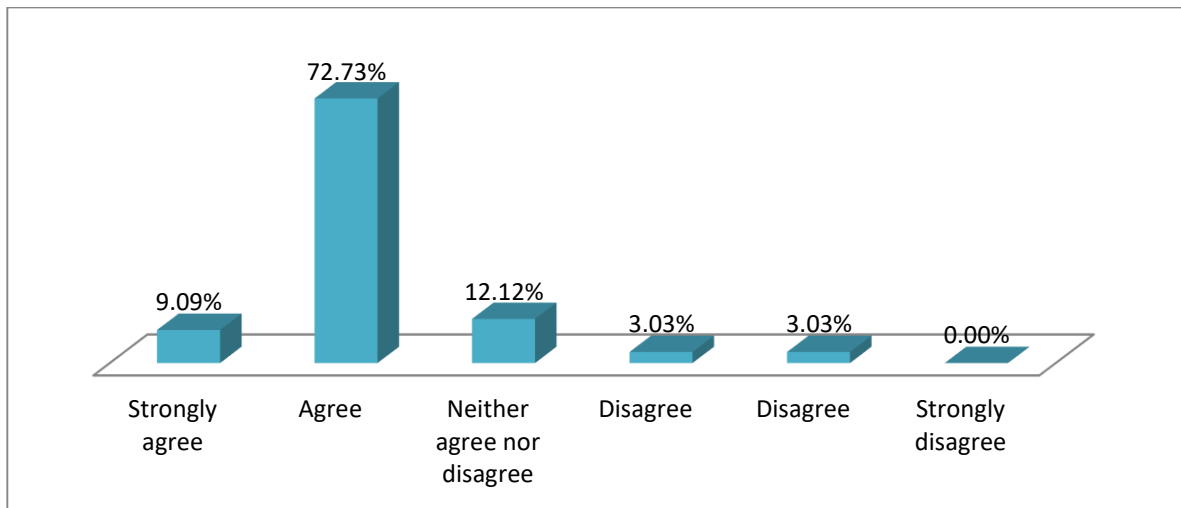
Theoretically one of the main goals of the new revision of the FIDIC forms of contracts is to cover the gaps in the previous revision based on the industry feedback, however, some gap may be considered as a minor matters which can be amended in the special conditions based on the nature of the contract, also unpopularity of the DAAB in UAE market may lead to uncertainty of the improvement in the new revision.

Q20. The New DAAB Procedure will encourage people to adopt it in future construction contracts.



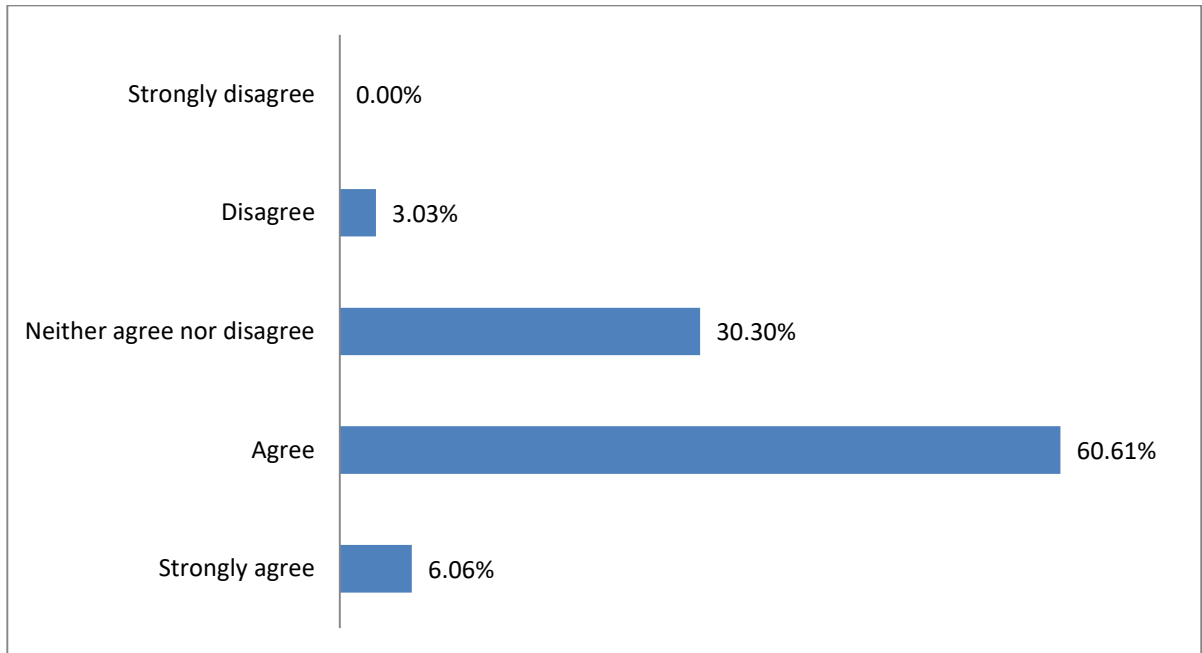
More than 65% of the survey participants were in agreement that the DAAB procedure in the new revision of the FIDIC Red Book will encourage the industry to adopt it in future contracts, however, almost one third are not certain about that as many other factors play significant roles of adopting the dispute resolution mechanism while only 6% believe that the new DAAB procedure has no effect on people decision of adopting DAAB in their contracts.

Q21. In General, the Dispute Resolution Mechanism Clauses in the new FIDIC Red Book are better than the ones in the previous revision (The 1999 FIDIC Red Book)



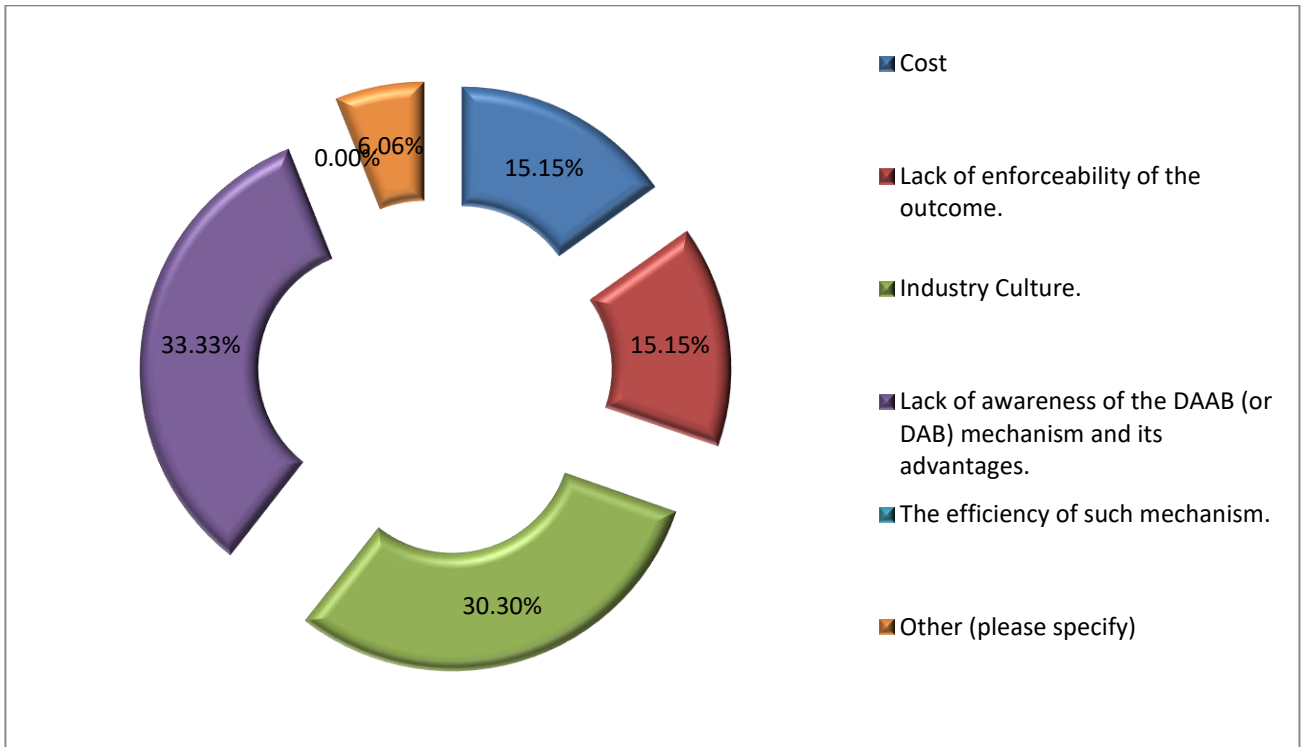
The majority of construction professionals who participate in this survey agree or strongly agree that the new DAAB procedure is better organized and structured than the previous one while around 6% only disagree or strongly disagree with this fact.

Q22. By using the new FIDIC Red Book in construction contracts, the dispute between parties will be minimized if not prevented.



Although there are various reasons behind disputes between parties in construction contracts, a well drafted and well-structured contract will definitely reduce the number of disputes between the contracting parties, this idea is matched with the result of this question as over 66% of the respondents believe that using the new FIDIC Red Book will certainly minimize the level of disputes between parties and only 3% disagree, the fact that the new FIDIC Red Book yet to be tested in the markets make 30% of the respondents to be neutral in this question.

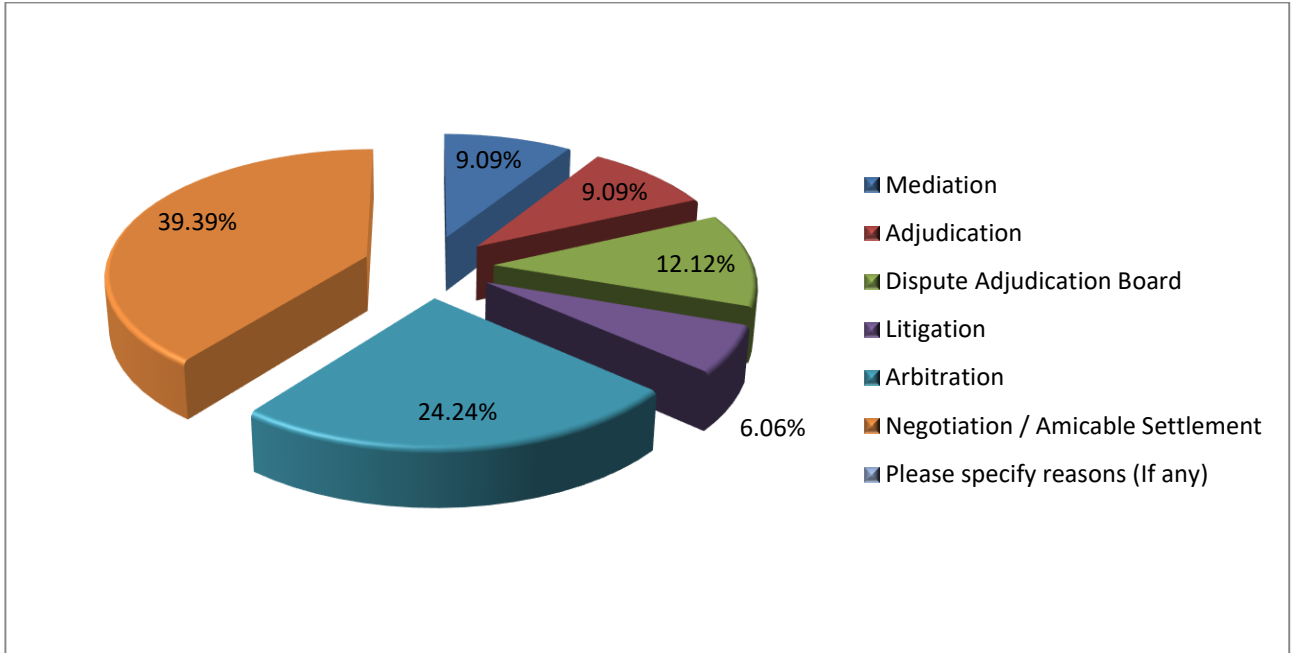
Q23. In your opinion, the main reason of less popularity of adopting DAAB (or the previous version DAB) as a method of dispute resolution in UAE is:



The majority of respondents believe that lack of awareness of the DAAB mechanism and its advantages (33%) and the construction industry culture (30%) to be the major reason of less popularity of DAAB in the UAE, followed by the additional cost of using DAAB (15%) and lack of enforceability of the DAAB’s decisions to be the second reasons of less popularity of DAAB in the UAE.

As can be noticed in questions 6 and 23 the culture of the industry need to be changed by promoting the DAAB as an effective dispute resolution in the construction contracts, the burden of this relies on the construction professionals who were involved in DAAB before as well as professional bodies such as CI Arb, CIOB that have influence in the construction field along with statutory legislation.

Q24. In your opinion, What Method of Dispute Resolution in Construction is the most effective one according to your experience?



According to Global Construction Disputes Report (2017) the most common dispute resolution mechanisms in the Middle East are:

1. Negotiation and amicable settlement
2. Arbitration
3. Adjudication

This is in line with the survey result, with 39% stated that negotiation and amicable settlement is the most effective dispute resolution method, and followed by arbitration (24%) and then Adjudication and DAAB (21%).

Negotiation is usually effective and inexpensive especially when parties want to maintain good business relationships, the enforceability of the arbitral awards give the arbitration the second popularity of dispute resolution in the UAE followed by adjudication which yet to be well promoted in the UAE construction industry, the last choice for the parties is the litigation which can be very long process.

6.3 Conclusion:

The survey provided conclusive view of the professionals regarding the new revision of the FIDIC Red Book and related update in the dispute resolution mechanism, in general variation to the original scope in the main reason of disputes in construction contracts, cost, speed and enforceability of the outcomes are significant factors for selection of dispute resolution mechanism, also the majority of the participant believe that FIDIC has provided robust project management tools and dispute resolution mechanism that most probably will lead to less disputes between the parties, finally lack of awareness and industry culture are the main reasons for less popularity of the DAAB in UAE, some efforts are required from different bodies to promote the DAAB in UAE.

CHAPTER SEVEN

CONCLUSIONS AND RECOMMENDATION

The complexity of construction projects makes disputes between the parties unavoidable. Eventually all disputes must be resolved; therefore, people adopt different mechanisms to resolve their disputes. A better option is to avoid such disputes by using a well-structured contract, as is the case with standard forms of contracts.

FIDIC standard forms of contracts are considered the most used forms of contracts worldwide; however, even by using such standard contracts, disputes between contracting parties still occur for different reasons—mostly relating to their understanding and interpretation of the contracts' terms. The FIDIC keeps updating its standard forms of contracts to cover all contractual issues in the field that are discovered over time. Recently (in 2017) the most updated version was released to the market, addressing the industry's feedback on the previous revision and to achieve clarity, transparency and certainty, as well as to balance risk allocation between the employer and the contractor.

One of the major changes in the new FIDIC Red Book is the dispute-resolution provision; the dissertation aims to examine the efficiency of the dispute-resolution mechanism under the 2017 FIDIC Red Book by examining the new claims procedure and dispute-resolution provisions and analyzing the likely usage of the developed provisions in the new FIDIC Red Book, which has been successfully achieved.

As explained in Chapter 2, by releasing the new FIDIC forms of contract, the FIDIC aimed to enhance the project management mechanism; achieve balance risk allocation between parties; strengthen the role of the engineer; achieve certainty, clarity and transparency; and address the

issues raised by the users of the 1999 edition. According to the survey, this was, for the most part, achieved in the new revision, as more than 70 per cent of the survey participants agreed or strongly agreed with this process.

Amongst other developments, the most significant areas of improvement in the new FIDIC Red Book represented by the new structure and terminology are that it provides more clarity and defined terms; more specific and detailed requirements for the project program (including the new Advance Warning aspect), which raises the flag to the parties about any critical circumstances; distinguishes different method of variations (variation by instruction and request for proposal) with different procedure and requirements; improves on the provisions of payments, value engineering, costs and profits; combines the contractor's and employer's claim in one robust procedure; updates the dispute-resolution provisions in a well-structured method; and includes a dispute-avoidance concept.

The claim is the starting point for any dispute. The rejection of a claim followed by a rejection of the rejection is simply a dispute; therefore, the claim provisions under the 2017 Red Book contain major modifications to emphasise the need for reciprocity between the obligations of the parties and to minimize the level of dispute as much as possible.

Unlike the previous revision, the new revision requires the employer and the contractor to follow the same procedure for any claim, whether the claim is for additional payment (or reduction in contract price) or extension of time (or extension of DNP). Also, the 2017 FIDIC Red Book includes more detailed provisions for notices and time bars with regards to claims and disputes, which increases the burden on the parties and the engineer to administer the contract.

There are essential elements that need to be considered by the claiming party for a claim to be successful. These include providing the required notices in a timely manner, submitting the full detailed claim within the specified time frame, keeping contemporaneous records and monthly updates as required, and considering any other contract clauses related to a particular claim. In all cases, the contract's clauses shall be read in conjunction with the applicable law (the UAE Civil Code), which usually imposes certain rights and obligations upon both parties.

Although the framework for dispute resolution in the new FIDIC Red Book has remained similar to that of the 1999 FIDIC, there are significant changes in the new revision to encourage dispute avoidance between the parties. This includes splitting the Claim Clauses from the Dispute Clauses to emphasise that the claim does not signify a dispute, and sharpening the role of the dispute board.

Although the Dispute Adjudication Board system has considerable, and proven, success where it has been applied in the market, especially in large projects, there is often a tendency among FIDIC users to delete the DB provisions in their contracts, ignoring (or underemphasising) the importance of the Dispute Boards (advantages and disadvantages were highlighted in Chapter 4). The existence of a Dispute Board will likely prevent disagreements between the parties from developing into disputes by informal intervention during regular site visits.

The method of dispute resolution under FIDIC contracts has developed from recourse to arbitration, directly after the engineer's determination, through a dispute board that could give recommendations to the Dispute Adjudication Board in the 1999 edition of the FIDIC Red Book, which, in the 2017 edition, was developed to include a dispute-avoidance role and is now called the Dispute Avoidance/Resolution Board (DAAB).

The survey provided conclusive views of the professionals regarding the new revision of the FIDIC Red Book and related updates in the dispute resolution mechanism. In general, a variation to the original scope is the primary reason for disputes in construction contracts. The cost, speed and enforceability of the outcomes are significant factors for selection of the dispute resolution mechanism. A lack of awareness and industry culture are the major reasons for the DAAB's lesser popularity in the UAE, even though international data and statistics show that most DAB decisions satisfy both parties.

Unlike arbitral awards, DAAB's decisions are not recognized in the UAE's courts. However, different methods can be applied to enforce a DAAB decision before the UAE courts, which were explained in Chapter 4.

Given the positive changes in the new FIDIC Red Book, which encourages the industry to use the DAAB widely, and the fact that the historical record shows that using a DAAB is less costly and time-consuming for dispute resolution or even dispute prevention compared to litigation or arbitration, some measures still need to be taken in order for the DAAB to be widely used in the UAE. The first and most important action is that the DAAB's decision must be recognized by legislation, and government entities may take the lead in adopting the DAAB as a mandatory dispute-resolution mechanism in their contracts. This will definitely encourage the market to follow similar steps, especially when it recognizes the benefit of using DAABs in construction contracts. Construction-related international organizations such as the FIDIC, CI Arb, RICS, CIOB and so on must encourage the construction community in the UAE to adopt the DAAB in their construction contracts by providing seminars to educate the community about the advantages and benefits of using DAAB.

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