

# International construction contracts and dispute resolution



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Discuss the distinction between the role of the Engineer as an agent of the Employer and the Engineer as independent of the Employer. Discuss also whether the distinction is useful, and whether and where (and why) it might be abandoned or retained.

In addition, consider and list the provisions in the FIDIC Conditions (Red Book) (1999 ed.) whereby the Engineer performs functions as:

1. Agent of the Employer; and/or
2. Independently of the Employer

The employer in a project is not an expert in the field of construction. The employer is one who only knows business thus, he needs someone with expert knowledge in the field to help him implement his project successfully. It is at this juncture the engineer come's into the scene who has the expert knowledge and helps the employer implement his project. He is employed by the employer and works for the employer in many different roles. As Dr Donald Charrett list out a series of thirteen roles that the engineer has to play, we can see that the engineer's role comes into play much before the construction starts. Here it is the role that he plays after the contractor is appointed and the construction starts, we will see the multiplicity and conflict in his role as an engineer.

The role that will be at focus in the essay, in broad terms is his role as an agent of the employer and as a decision maker. The essay will try to differentiate and discuss the roles in which the Engineer acts as an agent of the employer and roles where he acts independently from the employer. We will do this by looking out first as to how the concept of today's Engineer as

an agent of the employer had developed and then discuss the different FIDIC condition that define and differentiate the role of the engineer. In the next part the discussion will focus on the independence of the engineer and will define the roles where the employer acts as an agent of the employer and where he is independent of the employer. I will deal with the provision of FICID not as a separate part, rather will list and discuss it with the first part of the question.

At this stage I find it pertinent to first discuss who the engineer is according to FIDIC. The definition of an engineer can be found in sub clause 1. 1. 2. 4 of red and yellow book:

*“ ‘ Engineer ’ means the person appointed by the Employer to act as the Engineer for the purposes of the Contract and named in the Appendix to Tender, or other person appointed from time to time by the Employer and notified to the Contractor under Sub-Clause 3. 4.”*

This doesn't explain what the engineer job or role is as it has been dealt with by FICID under different sub-clauses under clause three. In a nut shell the Engineer is a individual whose role can be said to the project manager where he has to implement different aspect of the contract.

In sub-clause 1. 1. 2. 6 of red and yellow book the engineer is stated to be an employer's personal. Sub-clause 1. 1. 2. 6 stated:

*“ ‘ Employer's personnel ’ means the engineers, the assistant referred to in sub-clause 3. 2 and all other staffs, labour and other employees of the*

*engineer and of the employer; and any other personnel notified to the contractor, by the employer or the engineer, as the employer's personnel."*

Looking at both the definition clause it becomes clear that the engineer is one who is appointed by the employer and is considered as employer personnel. One thing that come out clear from the definition clause is that the Engineer is always an employee of the Employer. The gives rise to the question, if the engineer can be independent at any circumstance though the contract or at the least be fair and impartial.

The Engineer has multiple role to play which are related to the contract and some of his role as the Engineer starts much before the contractor is appointed. The Engineer was brought into the picture by the employer much before the contractor is appointed. The Engineer is brought in at the initiation stage as he is required to multiple works like assessing the design, advising on the contractor to the employer and sometime vet the projects viability to third party financier. With so many roles relating to the employer, can the engineer be expected to be independent.

Historically it depended on the term of a contract to decide if the engineer was independent of the employer or not. In *Ranger v Great Western Railway Co* [1]the court by interpreting the contract found that the engineer was never independent and his decision were therefore the decision of the company. Whereas in in *In re De Morgan, Snell & Co. and Rio De Janeiro Flour Milling Co* .[2], the chief engineer and the resident engineer were found to be independent from the employer. The basis was that where the engineer had autocratic control over the work and had the power to issue

final and binding decision, was considered to be independent from both the contracting parties.[3]The courts saw this authority as a conflict of interest hence, applied very strict standard to the way engineers executed his authority and power.[4]This resulted in a change in The way the Engineer was related to the employer.

The way the Engineer was related to the employer moved to a more modern form of the relationship we see today, where the Engineer mostly stands as an agent of the employer. The authority, duty and obligation were still derived from a contract and this resulted in courts taking a stricter stance on the role of an engineer. The courts have always imposed stricter and higher standard on the functioning of The Engineer. In cases where the contract engineer was the agent of the employer, the parties to the contract enter into the contract stating that the engineer has to undertake number of duties for the implementation of the project. Courts have mostly held that the engineer in case of absence of any words to the contrary in the contract is expected to act fairly in case of his role as a decision maker. Mc Farlan J in the case of *Perini corporation v Commonwealth of Australia* [5]had stated that,

*“ during the performance of all the duties under the contract the engineer will remain an employee of the government(Employer). Even during the discharge of his duty as a decision maker he continues to be the employee of the government, but he is still expected to act fairly and justly with skills towards both parties to the contract.”*

In the modern form, we see that the engineer became an agent of the employer in his different roles under the contract, but he was still expected to act as an independent person should work, who must be fair, impartial and honest towards both the parties when acting in his role as a decision-maker under the traditional system. But the industry moved on from the independent form of the Engineer and the system of impartial Engineer as a decision-maker was adopted. The concept of an impartial engineer was incorporated in the modern form of contractual provision for construction contracts (FIDIC).

### **3. 1Fidic On The Role Of An Engineer**

The engineer under the old FIDIC red book was expected to act impartially. As was stated under sub-clause 2. 6:

*“(d) otherwise taking action which may affect the rights and obligations of the Employer or the Contractor, he shall exercise such discretion impartially within the.”*

The incorporation and requirement of the impartiality of the Engineer was because of the realisation of the fact that there will always be a doubt on the impartiality. The presence of the doubt is because of the presence of conflict of interest as the Engineer is now the agent of the employer. Then over a period of time it was realised that the expectation of impartiality cannot be also confirmed. So there was again a change occurred from the requirement of being impartial to being fair.

According to Ola Ø. Nisja the concept of fairness developed through case law in the common-law system as the engineer was expected to be a person with <https://assignbuster.com/international-construction-contracts-and-dispute-resolution/>

professional ethics and you can expect from him to be a fair decision maker. Ola Ø. Nisja also states that the concept of a fair decision maker was not in common practice till the FIDIC form included it in their standard form of contract. Hence in the 1999 edition of FIDIC red book and yellow book the concept has been replaced with the concept of fairness with word "fairly" under clause 3.5 and the concept of impartiality was done away with. The reason being there will always be doubt on the impartiality of the engineer and that can be easily removed from the contract by words that can negate the expectation of impartiality. The thought has been made apparent by Lord Hoffmann in *Balfour Beatty Civil Engineering Ltd v Docklands Light Railway* [6] where he has stated that, "the architect is the agent of the employer, so he is a professional man but can hardly be considered to be independent". He speaks of the architect who is appointed in the role of The Engineer, where you can still expect an individual to be fair if not independent or impartial. Intellectually speaking the concept of being fair is inherent to the nature of a decision maker that is expected in a common law system and it is easier to expect the engineer to be fair than being impartial. Even when the contract doesn't impose any obligation in any way, the engineer is still expected to act in a, honest, fair and reasonable manner when undertaking the role of a decision-maker. The above observation comes from *Balfour Beatty Civil Engineering Ltd v Docklands Light Railway Ltd* only where there was no appointed engineer for the project and the employer itself through its own employee took up the duty of decision maker, he was still expected to be fair, honest and reasonable[7]. Other than the implied duty of acting impartially there is expressed duty under the code of ethic to act impartially also. Of the many issues that challenge the impartiality of the engineer one <https://assignbuster.com/international-construction-contracts-and-dispute-resolution/>

that, the engineer has to make a decision regarding to his own work. In such position there cannot be an expectation for impartiality at all. Of the many roles that Dr Donald Charrett list most of them have been infused into new role of an engineer in the modern time where he is the agent of an employer.

As an agent, the duty of the engineer is to successfully implement the project which is surrounded around the condition that he has to work in the best interest of his employer. But as a decision maker he takes relief from his role as an agent of the employer and is expected to act as a neutral decision maker between the employer and contract and “ fairly’ decide the dispute. The clear differentiation of the engineer’s role can also be seen in standard form of contracts and specifically FIDIC. The role of an engineer is dealt in different sub-clause of clause three of both the FIDIC red and yellow book. Condition 3. 1 deals with the duty and authority of an engineer and condition 3. 1 (a) of both the red and yellow book state:

*“ Expect as otherwise stated in these condition:*

1. Whenever carrying out duties or exercising authority, specified in or implied by the contract, the engineer shall be deemed to act for the employer;”

This makes it pretty clear that the employer is expected to act an agent of the employer in relation to any of the act he is required to do under the contract.

And condition 3. 5 of red and yellow book state deal with the role of an engineer as a decision maker, where it states that:



*“ If agreement is not achieved, the Engineer shall make a fair determination in accordance with the Contract, taking due regard of all relevant circumstances.”*

It is clear from the wording of the FIDIC form of standard contract the engineer is in a position to represent the Employer in all matter, however he also has the obligation to discharge his contract obligation as a decision maker in a fair manner. Hence, of the many roles, an engineer plays, it is here as a decision maker, the engineer is expected to be fair and evenhanded when he is deciding the dispute. So, what we get in general is a person who is throughout the contract phase an agent but when required he has to act in the capacity of a decision maker and be neutral and fair.

The sub-clause provides that he has to act fairly and even if the clause is struck out, under common law contracts there is an implied condition that the engineer still has to act fairly. Although the impartiality has been replaced with the concept of fairness, some author make it clear that the contractor should never assume that the engineer belongs to the employer but rather he should assume that the engineer acts independently and impartially according to his professional standards. The concept of an engineer is not discussed in the civil law system hence, may French courts have been seen struck down any clause which gave power to the engineer to decide a dispute. The problem here is that the role on an engineer and he operates is a common law developed concept which has been best explained by Mc Farlan J in Perini corporation v Commonwealth of Australia[8]

*“the essence of such a relationship where the engineer acts in dual capacity is that the parties have voluntarily agreed so in the contract. The parties have agreed that they will accept and bind themselves on matter that he is required to decide”*

The engineer's duty to act fairly is an obligation that is understood to arise from the term of contract. FIDIC condition is a standard form of contract and when adopted for any project makes it a valid form of contract and clause 3.5 makes its legally binding clause and if the engineers don't act fairly then it becomes a breach of contract. In a contract, it is the duty of the parties to follow the contract and act in good faith towards the fulfilment of the contract. Hence, the duty is somehow on the employer to see to it that the engineer acts fairly to honour the clause of the contract when acting as a decision maker as the Engineer is an employer personal according to the definition.

The engineer is a person who may not be himself involved in the dispute but definitely has interest in the dispute. One he is deciding upon a dispute that is there because of a decision he took earlier relating to a work and second, he is deciding something which is going to affect both the parties, and he is related to one of the parties. Then the contract expects the Engineer to not only protect the employers interest, he will also be protecting his interests as his decision is related to one of his work only. While the Engineer takes over the role of the engineer he is still employed by the employer and his salary being paid by the employer so, when the engineer is acting as a decision maker he is getting paid by the employer only for that role too. In view the impeding nature of lack of independence in the role of an Engineer that the <https://assignbuster.com/international-construction-contracts-and-dispute-resolution/>

FIDIC books have two safe-guards when he is acting as a decision maker: to decide fairly and in accordance to the contract. Then again, to promote fairness the FIDIC book also prohibits the Employer from replacing the engineer with anyone against whom the contract raises any reasonable objection.[9]

HHJ Jackson state the legal situation of an engineer in the best possible way in *Scheldebouw BV v St James Homes (Governor Dock) Ltd* [10]

1. The terms of the contract according to which the engineer has to work determine the role and duty of the decision maker
2. There cannot be an expectation that he decision maker is in anyway independent from the employer.
3. But while acting as a decision maker the decision maker is expected to act in an independent, impartial, fair and honest manner. He should act using his professional skill to reach the right decision and should not indulge in any favourism towards his employer.

The last point is of interest here where it states that he is expected to act in a manner which is independent from the employer. It gives the notion that the decision maker is never truly independent from his employer, but he is expected to shed that relation while acting as a decision maker. This makes it clear that a decision by the engineer can only be challenged in cases where there is a doubt of impartiality or lack of fairness. Hence, it must be remembered that doubt on the independence of the Engineer can be no more a ground for challenging the decision. However, the Engineer is expected to be fair and neutral, so any possibility or even the doubt of the

presence of bias by the Engineer towards the Employers Interest in the decisions and determination of contractual disputes, provides the contractor with the opportunity and the avenue to appeal against the decision of the engineer.

After going through the relevant provision of FIDIC, case laws and works of different field expert we can say that in the modern system of construction contract the concept of an independent contractor is not present any more. All the while the engineer is only expected to act independently but there is no actual individuality that is independent of the employer. As I have earlier stated the engineer is always paid a salary by the employer, even when he is acting as a decision maker so there cannot any presumption of independence. The FIDIC condition also moved on to the concept of a fair determination as impartiality can be in question and can't be always expected. The reason being there would always be doubt because the Engineer never stops being the agent of the Employer or as the FICID states " Employers Personnel". According to Charles C MacDonald, the Engineer is one individual who lacks the necessary requirement of independence to make important decision, as he is appointed by the employer.[11]Even Redfurn and Hunter in their book agree that the engineer who is appointed by the employer will lack the necessary independence to make important decision.[12]As we take stock all that has been discussed till now all we can say in layman's language, the engineer is never independent but it is his duty to act in an independent manner.[13]

At the end, we can conclude that there is no real distinction between the role of the Engineer where he acts as the agent of the employer and a role which

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he takes up, that is independent from the employer. No provision in the FIDIC form of contract also differentiate between the role rather the provision make it clear that he remains as agent all the while till the contract is in place. There are safeguards to ensure impartiality and fair decision making but still role like the one of decision maker should not be in anyway related or inclined to any party. This results in the lack of independence in the decision-making process as the trust in the engineer being fair is also lost. This has in the recent years has only resulted in using the Engineer as a decision maker only a procedural requirement as his decision is just a prerequisite to go for a DAB decision or arbitration. The present form has its advantages as it helps in resolving disputes quickly and is serving its purpose in most of the cases but also has in its own disadvantages. The engineer's fairness will always remain a matter of question and doubt. There is no requirement to completely overhaul the present system, there is just a need to reduce the disadvantages. As recommended by Ola Ø. Nisja, one engineer can be appointed as the agent of the employer for all the roles presented by the contract, except the one of decision maker and when a dispute arises, a new engineer who is not part of the project be brought in to decide on the matter

The concept of an independent Engineer in practice was lost long ago as we moved to the present form. An Engineer independent of the Employer is a myth. However, as we saw, even as an agent of the employer the engineer has to act fairly while acting as a decision maker and giving determinations. It will always be a challenge to the role of an engineer but he has to overcome this shortcoming has to show real professionalism.

[1](1854) 5 HLC 72; 10 ER 824

[2]Hudson's Building Contracts (4th ed) Vol II 185

[3]Ibid, p 215

[4]Ibid

[5]Perini Corporation v Commonwealth of Australia [1969] 2 NSWLR 530.

[6]Balfour Beatty Civil Engineering Ltd v Docklands Light Railway Ltd (1996)  
78 BLR 42

[7]Ibid

[8]Perini (n 5).

[9]Sub-clause 3.4 FIDIC Red book (1<sup>st</sup> ed) 1999 & FIDIC Yellow Book (1<sup>st</sup> ed)  
1999

[10]Scheldebouw BV v St James Homes (Governor Dock) Ltd [2006] EWHC  
89 (TCC)

[11]Charles C MacDonald, " Allocation of Risk in Major Infrastructure Projects-  
Why do we get it so Wrong?" ([2001] ICLR 345),

[12]Ibid

[13]Scheldebouw (n 10)